



IMPROVING MARKET OUTCOMES


ENHANCING THE POSITION OF FARMERS IN THE SUPPLY CHAIN

Report of the Agricultural Markets Task Force
Brussels, November 2016

H. Giesen, A.L. Paumier, D. Dobbin, A. Babuchowski, I. Šarmír†, Commissioner P. Hogan, C. Veerman, E. Valverde, A. Juhasz, T. Iwarson, L.O. Fresco (J. Bédier, G. Calzolari missing).

Photo taken at the inaugural meeting of the Agricultural Markets Task Force on 13 January 2016

I should like to take this opportunity to express the intellectual pleasure I have had and the honour I felt to in chairing the Agricultural Markets Task Force. I wish to thank my fellow members for all the effort they have invested since January this year. My gratitude also goes to the external experts who have addressed the Task Force. They came from near and far to contribute to this important work and to share their rich expertise with us. Last but not least, I should like to express my gratitude to the staff in DG AGRI who have provided high-quality secretarial support to the Task Force during its deliberations.

Cees Veerman

Brussels, 14 November 2016

Members of the Agricultural Markets Task Force

Cees P. Veerman, chair - Professor of European agriculture and rural economy at University of Tilburg, Wageningen University and Erasmus University Rotterdam, former Minister of Agricultural, Nature an Food Quality, Netherlands

Esther Valverde Cabrero, vice-chair - Deputy Director-General for Food Supply Chain Structure, Spanish Ministry of Agriculture, Food and the Environment, Spain

Andrzej Babuchowski - Titular professor in agricultural sciences, Faculty of Food Sciences, University of Warmia and Mazury, Olsztyn; president of the Dairy Industry Innovation Institute in Mragowo, Poland

Jérôme Bedier - Deputy Chief Executive Officer and Secretary-General of the Carrefour Group - FR

Gianpiero Calzolari - Coordinator of the dairy sector of Alleanza Cooperative Italiane, Italy

David Dobbin - Group Chief Executive of United Dairy Farmers; Chairman of Dairy UK, United Kingdom

Louise O. Fresco - President of Wageningen University and Research Centre, Netherlands

Helfried Giesen - Retired Chief Executive of the Board of the meat cooperative Westfleisch SCE, Germany

Torbjörn Iwarson - Independent agricultural markets advisor at Svenska Commodities and portfolio manager at Skandia Investment Management, Sweden

Aniko Juhasz - General Director of the Research Institute of Agricultural Economics (AKI) in Budapest, Hungary

Anne Laure Paumier - Deputy Head of Coop de France Grain Department (Head of market and risk management) - Member of COPA-COGECA cereals expert group, France

Igor Šarmír[†] - Commercial relations expert at the Slovak Chamber of Agriculture and Food; Member of the European Economic & Social Committee, Slovakia

Les produits de la terre sont pour tous; même un roi est tributaire de la campagne.

Ecclesiaste 5:8

This report was written by the Members of the Agricultural Markets Taskforce. The views expressed are the authors' alone and do not necessarily correspond to those of the European Commission.

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EXECUTIVE SUMMARY

1. This report examines the position of farmers in the supply chain and makes recommendations as to how to improve that position. It is the result of the deliberations of the Agricultural Markets Task Force (Task Force), which was set up in January 2016 as a European Commission expert group at the instigation of Phil Hogan, the Commissioner for Agriculture and Rural Development.

2. The Common Agricultural Policy (CAP) has become more market-oriented and less reliant on the management of markets than before. Consequently, European agriculture is increasingly integrated in global markets. The shifts have been incremental. The phasing-out of milk and sugar quotas is the latest step in this process. Open markets imply opportunities but also challenges. There is concern that farmers, generally fragmented as a group and less supported now by the policy tools that operated to sustain producer prices in the past, are becoming the main shock absorber in the supply chain as regards market risks such as price volatility or prolonged periods of low prices.

3. The reduction of the scope of classical market measures has been accompanied by the introduction of direct payments that were designed to absorb these shocks, but also by a stronger emphasis in the CAP on a regulatory environment to strengthen farmers` organisational structures. The 2013 reform of the EU's Common Market Organisation regulation enhanced governance of cooperation among producers - in particular through an emphasis on producer organisations, their associations and interbranch organisations.

4. The shift away from daily market management towards rules that allow reliance on instruments managed by the sector is, in the view of the Task Force, work in progress: the policy framework can and should be further improved. The report contains a list of recommendations to this end.

5. The Commission should take further steps to increase **market transparency** so as to foster effective conditions of competition along the supply chain. Bigger and better-equipped up- and downstream operators usually have a clear view of the market while farmers - often fragmented and small – frequently do not. This information asymmetry creates mistrust, in particular in relation to price transmission and the distribution of value added along the chain. Among other things, this report recommends mandatory price reporting to cover existing information gaps in the chain - and dissemination of the collected data in duly aggregated form to increase transparency.

6. The Commission market observatories and dashboards are commendable steps in the right direction but there is room for improvement, in particular as regards the timeliness and the standardisation of data collected from Member States. It should be examined whether consumption data and producers' input prices could be integrated into existing market information systems. The Commission should create a platform for better communication and exchange of information between Member States concerning how market data is collected and how national food chain observatories work. 'Food euro' calculations at EU level and Member State level for all major food products could provide useful information for the public at large, including consumers, about the distribution of the value added along the chain. The Commission should step up the adoption of modern and easy-to-use communication formats (such as web-based applications). Member States should be encouraged to seize the opportunities which 'big data' offers for the benefit of farmers, and facilitate initiatives that help farmers make sense of the wealth of data generated on and off farm.

7. The uptake of EU **risk management** tools by farmers has been modest. The Commission should make the EU's risk management toolkit more attractive and coherent with instruments set up by Member States so as to enable farmers to manage risk ex ante. Ideas include the mandatory inclusion of measures in Member States' rural development programmes. This step could be accompanied by monitoring and evaluation systems that map all relevant data linked to the occurrence of risks. Minimum thresholds applying to crop losses for insurance purposes could be revised to make the tool more attractive to users. The added value of EU co-financing of reinsurance schemes should be assessed.

8. This could imply a resource shift towards a genuine integrated risk management policy at EU level. In order to keep control regimes cost-effective, the possibility of using simplified loss calculation and reimbursement options should be taken into account. The Commission should set up an EU platform - including Member States and stakeholders - allowing the exchange of best practices concerning agricultural risk management. Certain tools and systems which are already effective in Member States may thus become more widely known and used. Member States could also use this platform to exchange information about existing practices of tax averaging, to assess the potential usefulness of these practices for agricultural producers across the EU.

9. **Futures markets** can be an important risk management tool for farmers in times of increased price volatility. In this area in particular, awareness-raising and training measures in the farming community and farmers´ organisations should be prioritised. Price data collection and dissemination by the Commission under the heading of market transparency can stimulate futures markets by providing reliable and credible price references which are instrumental for settling futures contracts. The report also invites the Commission to volunteer expertise to the legislator in matters - such as EU-level financial regulation - which might have unintended negative consequences for the liquidity of futures markets.

10. As regards **unfair trading practices**, voluntary initiatives have been useful to a degree. They have, however, not been able fully to address the 'fear factor' which often arises when an operator is considering making a complaint, and they have fallen short of introducing effective and independent enforcement. The report recommends that framework legislation be introduced at EU level - to cover certain baseline unfair trading practices (for instance maximum payment periods) as well as to mandate effective enforcement regimes in Member States - such as an Adjudicator. Such enforcement regimes should include the power to conduct own-initiative investigations, as well as the possibility for victims of unfair trading practices to lodge anonymous complaints. A mixed approach of statutory and voluntary rules including at EU level, as far as agricultural products are concerned, would be appropriate and timely. It can accommodate well-functioning enforcement systems existing in Member States. By the same token, the voluntary Supply Chain Initiative facilitated by the High-Level Forum on the Better Functioning of the Food Supply Chain has had positive effects; it should be continued and improved.

11. Cooperation in the supply chain via '**contractualisation'** can allow non-antagonistic commercial relationships to develop which could meet consumer demand for innovative products, while also responding to public expectations concerning sustainability. Successful arrangements such as dedicated supply chains, tripartite agreements and similar initiatives exist and should be publicised better as examples for best practices. The Commission should facilitate this, allowing operators to come together and learn from each other.

12. The absence of written contracts is often a disadvantage for the weaker party in a commercial transaction. Farmers should be able, under EU rules, to request and obtain a written

contract. This would complement the existing general possibility for Member States under the CMO regulation to make written contracts mandatory.

13. The feasibility and effectiveness of (possibly mandatory) ex ante value-sharing mechanisms through collective negotiations between operators should be examined, in particular in sectors where the distribution of added value in the food supply chain appears lopsided. The objective would be to establish a firmer and possibly fairer link between producer prices and the added value accruing in the chain.

14. As regards **producer cooperation**, the report brings to light a lack of clarity concerning the rules which apply to collective action by producers. Different concepts underlying classical competition law and agricultural derogations in the CMO regulation have given rise to regulatory confusion. The 2013 reform has introduced further approaches to dealing with collective action by farmers. While the intention was to strengthen the position of farmers in the chain, the new provisions may have exacerbated the legal complexity. Rules should be made clear and workable, so that farmers do not need to hire legal counsel when planning to cooperate. The Commission should unambiguously exempt joint planning and joint selling from competition law if carried out by a recognised producer organisation or association of producer organisations. Safeguards should ensure that competition is not eliminated and CAP objectives - such as reasonable consumer prices – are not jeopardised. Such clarification will further the CAP's policy orientation of encouraging producers to organise and help themselves. Pure 'bargaining associations' between producers should be allowed up to certain market thresholds, so that such joint selling will not affect competition. Moreover, the 'dormant' Article 209 of the CMO regulation should be 'revived' and the possibility of obtaining legal security up-front (comfort letters) introduced. The scope of the 'crisis cartel' provision, which allows agreements between producers (including producer organisations and interbranch organisations), should be adjusted.

15. Measures to facilitate **access to finance** for farmers should be stepped up, in particular by the European Investment Bank Group (EIB Group). The current risk aversion of commercial banks is liable to lead to underinvestment and affect the competitiveness of the agricultural sector. The Commission should encourage the roll-out of pilot projects by the EIB for the agriculture sector as well as the development of targeted financial instruments (e.g. addressing young farmers or price volatility) that leverage CAP money on a guarantee basis and thus attract private-sector funding. Member States should be encouraged to liaise with the EIB Group to acquire the necessary expertise in managing financial instruments that provide better access for farmers to finance. Tools administered directly at the EU level may, at least partially, alleviate the administrative challenges for Member States. The Commission and the EIB should continue their current exploratory work concerning the setting-up of an export credit guarantee facility at the EIB for agricultural exports to new or risky markets.

16. The report contains in its third part some general considerations concerning the **CAP after 2020**. It places the policy in its historical context, which is one of constant adaptation and reform. It bears witness to the CAP's historical ability to successfully address the challenges with which diverse agricultural sectors and rural communities are confronted.

17. The Task Force posits that the policy direction which the reformed CAP has taken should not be reversed. A modern CAP should continue along the path taken. However, it should also play a role for those farmers who do not consider integration in international markets an opportunity to grow their business and thereby reap the rewards of economies of scale on export markets. A modern CAP should remunerate

farmers who specialise in specific products and services, provided they offer measurable advantages for animals, nature and landscapes which are in the public interest.

18. Climate change is one of the most ominous of all global governance issues and presents adaptation and mitigation challenges for agriculture. The demand for nature conservation and other activities which contribute to the vitality of rural areas constitutes business opportunities for farmers. Regulation, remuneration for public goods and services supplied, support measures for farming in transition between paradigms and new adequate technologies will have to be part of the policy mix of the future. In particular, they can provide sources of income for regions and farmers not oriented towards world markets. The Cork Declaration 2.0 lays out a roadmap in this regard and affords perspectives for rural economies and the social fabric of the countryside. Much of this assistance should be organised at Member State level.

19. 'Farming the future' of the EU also includes contributing to a healthier life style and healthy food - that is to say food that is healthy in its composition but also produced in a way that society values as appropriate and ethically sound. Sustainability (e.g. climate neutrality, good working conditions and animal welfare) is a key element that should be addressed.

20. The report acknowledges the need for constantly communicating and explaining the EU's agricultural policy and related policies such as trade policy, in particular where mistrust is on the rise concerning the benefits of market integration.

21. The report also suggests a rethink of the direct payments regime, which has shown limitations in its current form. A resource shift towards an integrated risk management policy at EU level that is complementary to existing strategies at Member States level is advocated, while sustainability considerations should continue to play a prominent role.

22. The emphasis on innovation should be stepped up: e.g. on research and development in agricultural production methods and on new ICT-based assisting technologies such as precision agriculture, but also organisational innovation along the chain in accordance with evolving consumer demand. Centres for education and training in Europe have to be revitalised and should integrate curricula focused on innovation, farm management and agricultural engineering. These steps are important for making the EU's agriculture sector more attractive to new entrants.

In the Task Force's view a modern CAP should have the broader scope set out in this report and, as such, would constitute an effective and efficient instrument to contribute to solutions for the future of agriculture and would embody a common interest in Europe's position in the world.

PART I – INTRODUCTION

1. MANDATE

1. In September 2015, Phil Hogan, the European Commissioner for Agriculture and Rural Development, presented a solidarity package worth € 500 million to assist agricultural markets which were under pressure due to a market imbalance triggered by the Russian embargo against food imports from the EU, slowing demand from China and the end of milk quotas. At the same Council meeting, the Commission announced the creation of a high level advisory group to look into the functioning of the supply chain and the position of farmers therein.

2. This group was created in January 2016 with the name 'Agricultural Markets Task Force' (TF). The TF was tasked with providing the European Commission with advice and expertise regarding the functioning of agricultural markets and farmers' position in the supply chain, as well as with making recommendations and proposing policy initiatives in this field - taking into account global challenges for sustainable agriculture. The TF´s work is complementary to the work carried out by the High-Level Forum on the Better Functioning of the Food Supply Chain.[1]

3. The composition of the TF can be found at the beginning of this report. Sadly, Mr Igor Šarmír passed away in September in a hospital in his native Slovakia. While ill and bed-ridden he shared his thoughts on the overall direction of European agriculture during the summer with the TF. We should like to honour his memory by attaching this submission to the report as Annex E.

4. The TF's recommendations are set out in Part II. They focus on the following seven main issues: market transparency, risk management, futures and other derivative instruments, trading practices in agricultural markets, use of contracts ('contractualisation'), the Common Agricultural Policy (CAP) and competition law and access to finance.

5. The report as a whole has the support of the TF. However, Mr J. Bédier has not been able to agree to chapter 7 on 'trading practices in agricultural markets' and gives the following reasons: "(i) The question of farmers' income depends on the market equilibrium and not on UTPs. This is a key point if we aim at finding concrete solutions reflecting today's reality. (ii) UTPs are a matter of commercial law and fall within the competence of Member States, the vast majority of which have put in place schemes to tackle UTPs. The role of the European Union should consist in (a) monitoring the progress and drafting recommendations on best practices, and (b) highlighting the areas of particular concern and promoting positive common or individual initiatives."

6. In Part III we share our considerations concerning the broader orientation of the CAP for the period after 2020. This is without prejudice to the concrete recommendations set out in Part II which will remain valid whatever course followed by the CAP.

2. WORKING METHOD

7. The TF has held eight meetings on various themes that we consider important in relation to the position of farmers in the supply chain. The TF's chair circulated issue papers before each meeting in order to prepare and frame the discussion. In the morning sessions of these meetings we heard and discussed presentations either by experts of the TF, by external experts

[1] http://ec.europa.eu/growth/sectors/food/competitiveness/supply-chain-forum/

who had been invited or by experts from the European Commission. In the afternoon sessions the TF discussed the selected themes in greater depth.

8. We furthermore initiated a consultation process with stakeholders at large, via the website of the TF in accordance with the themes discussed. We also encouraged stakeholders to send us any concrete ideas with regard to our mandate. The third-party contributions we received (in total 58) include contributions from Member States. All these contributions were very valuable.

9. The documentation referred to above is accessible on the website of the TF (http://ec.europa.eu/agriculture/agri-markets-task-force/index_en.htm).

10. Last but not least, we developed our findings partly on the basis of a review of specialised literature such as academic papers, reports and studies as well as a review of the relevant legal provisions.

11. The TF engaged in outreach in the form of meetings with industry interest groups and professional organisations covering the whole food supply chain. It consulted the European Parliament (COMAGRI) and the Council. The TF has taken note of the resolution of the European Parliament of 7 June 2016 on unfair trading practices in the food supply chain as well as of the report of the European Economic and Social Committee of 30 September 2016 on unfair business-to-business trading practices in the food supply chain. Last but not least, the TF recalls the international experts' conference organised by the Slovak Presidency in Bratislava from 31 June to 1 July 2016 on the theme of strengthening of farmers´ position in the food supply chain.

3. CONTEXT

12. We take as our point of departure the continuing trend of market orientation of agriculture and the CAP. As part of this trend, support through classical EU market management measures such as public intervention or private storage aid has been significantly reduced. Use of these measures has diminished to the level of a safety net in times of market crisis and is no longer a regular feature of daily policy. With hindsight one can discern incremental shifts of the policy paradigm underpinning the CAP since at least 1992.

13. The future of the CAP and the farming sector depend on societal support. Today's consumers are interested in safe and sustainable agricultural production which also does justice to local traditions. Classical market mechanisms do not provide adequate incentives to ensure sustainable production.

14. Increasingly producers will not produce only food but a plethora of agricultural products and by-products that find their way into many parts of the supply chain (agricultural cascading) hence this report focuses on strengthening farmers' position through the entire chain.

15. The agricultural sector´s greater integration in the world economy, while offering opportunities, implies greater downside risks of (imported) market instability and increased price volatility. A further consequence of reduced market intervention can be lower general price levels, this being different from price volatility. Low prices negatively affect farmers` incomes in the longer run and may undermine their very economic viability. While both effects present challenges to farmers they suggest different counter-strategies on the part of farmers and policy makers alike. As will be seen, the distinction underlies this report´s reasoning.

16. The EU agricultural sector´s international competitiveness has been an issue of constant concern. At the same time farmers find that their

trading partners both upstream (fertilisers, plant protection, seeds) and downstream (processing, retail) are increasingly concentrated. Negotiating power in the supply chain has been shifting and this shift has clearly not been in favour of primary producers. Their share of the value added has increasingly been under downward pressure. In general, important socio-structural changes have been underfoot which have had for a result a diminishing number of agricultural holdings which often specialise and/or grow to remain viable.

17. Agriculture is an economic sector characterised by unique traits. While business risk is inherent in all economic activity, agriculture is particularly fraught with uncertainty. The amount and quality of output from agriculture, mainly concerning vegetal production that will result from a given set of inputs are typically not known with certainty, due to uncontrollable elements, especially weather and diseases. Weather patterns are becoming even less reliable. Our models do not readily capture outlier climatic events that occur more frequently due to climate change. Moreover, there are long production lags due to the biological processes on which agricultural production is based. Production decisions have to be taken in advance with limited knowledge of final outcomes and in a possibly changing market situation. From this follows that agricultural production has limited flexibility.

18. What is more, the financial and economic crisis has reduced available budgets for rural areas and agriculture in general in many EU countries. We expect the continued availability of current financing levels for agriculture also to remain under pressure at the EU level.

19. It is against this backdrop that the question as to the position of producers in the supply chain assumes great importance. If the old tools are being discontinued or are only being deployed in crisis situations, what *are* the tools of the CAP which allow pursuit of the objectives the Treaty on the Functioning of the EU lays down in Article 39, in particular those of ensuring a fair standard of living for the agricultural community and of stabilising markets?

20. In Part II of this report we set out recommendations for measures that in our view could successfully fulfil some of the functions of classical market management. As already stated, they stand alone and are valid regardless of the broader orientations of the future CAP. By and large, they imply a much greater reliance on the self-help and self-organisation abilities of the sector and the supply chain as a whole, facilitated by adequate rules at EU and Member State level. The majority of the measures we recommend do not involve significant budgetary outlays.

4. MARKET TRANSPARENCY

4.1. Introduction

21. Market transparency can be defined as the availability of relevant market information (e.g. concerning prices, weather, production, trade, consumption and stocks) for all market participants. In economic theory perfect markets have been associated with the possession of perfect information, that is to say a situation in which all consumers and producers have perfect knowledge of price, utility, quality and production methods of products. As such, a perfect market is an ideal. Real markets do not normally display perfect market conditions; they range from closer to the ideal to farther away from it.

22. Transparent markets in general allow an efficient allocation of productive resources. For instance data on prices, production, stocks and trade helps producer take well informed production decisions rooted in an understanding of market conditions. Market transparency benefits producers´ market expectations and understanding of what shapes their commercial relation with processors, their direct partners in the supply chain. On that basis they can adapt their production and decide upon appropriate risk management strategies.

23. In general, greater price transparency helps farmers negotiate their contracts, including forward contracts. Robust, specific and transparent price data for specific commodity grades facilitates acceptable contract specifications[2] and cash settlement and can thus promote the development of futures markets (see chapter 6).[3] Transparent markets can improve access to finance by enabling more robust business plans and thus better appreciation of market risks by lenders. Last but not least, accurate and complete market information supports evidence based policy measures.

24. Apart from the information which actors on a market are able to obtain on their own, both public and private bodies may gather and disseminate additional market information where such information is not readily available to the individual (and public) interested parties or where it is asymmetrically distributed (imperfect information). Public bodies are sometimes seen as more objective and credible than private bodies when pursuing this activity; they may assure better access to information for *all* market participants and promote an open, stable and standardised framework for the collection and presentation of data.[4]

25. The European Commission collects agriculturally relevant monthly data from Member States and disseminates this information in the form of production, trade and price data. Recently, milk and meat market observatories have been set up at EU level[5] which bring

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[2] AHDB (Agriculture and Horticulture Development Board), March 2016, 3rd party contribution to the TF, page 6

[3] See B. Teuwen (DLV Market Advisory), 12 April 2016, presentation to the TF, slide 6

[4] For an overview of the role of public data see: The Council on Food, Agricultural & Resource Economics (C-FARE), Value of USDA Data Products. Washington DC, 2013, http://www.cfare.org/events/c-fare-events/2013/seminar-to-elucidate-the-value-of-usda-data

[5] European Commission, DG AGRI, http://ec.europa.eu/agriculture/market-observatory/milk/

together the information in a one-stop-shop complementing it with data on world markets. In addition, the Commission draws up annual balance sheets (including use and stocks) and publishes forecasts each month for cereals and oilseeds and three times a year for meat and dairy products. Eurostat has set up the Food Price Monitoring Tool to compare changes in food prices over time at the level of agricultural commodities, food industries and consumer goods.[6] At present, seven supply chains are covered.

26. Market information collected by public authorities with a view to market transparency is only a part of a wealth of data that is increasingly collected on-farm (e.g. through Enterprise Resource Planning and precision farming data) and across the supply chain (e.g. scanner data) through the use of Information and Communication Technology (ICT) tools. There will be more of such data in the future and it will become increasingly detailed, covering the different aspects of farm management and the supply chain down to the consumer who is able to access relevant data via his smartphone.[7]

4.2. Issue

27. To support business decision-making in the supply chain, information under two broad themes is required. The first relates to physical supply and demand information concerning commodities and associated products, which includes timely and robust estimates, for example of production, stocks, trade and processing capacity. The second theme relates to prices.[8]

28. Not in all agricultural sectors, not at all levels of the supply chain and not for all its operators is market transparency from farm to fork a given. Far from it. Problems relate to accuracy, comparability and timeliness of supply and demand data, including where this data is managed by public bodies such as the Commission. It should be recognised that farmers sell goods directly to retailers only infrequently; most goods are processed in one or several steps before they reach the final consumers (wheat-bread, raw or processed milk-cheese). One exception is fresh produce, for instance fruits and vegetables, which is sold directly from farmers or their organisations to retailers or directly to consumers (short supply chain).

29. The supply chain can be seen as a series of consecutive markets involving input providers and producers, then producers and processors, then processors and wholesalers/traders and finally wholesalers/traders and retailers. Each of these markets is shaped by its own specific supply and demand accounting for price formation. The consecutive markets are inter-linked and depend on each other.[9] For a full picture an understanding of the evolution of prices and value added at all stages of the supply chain would be useful.[10] But farmers are

[6] Eurostat, http://ec.europa.eu/eurostat/web/hicp/methodology/food-price-monitoring-tool

[7] European Commission, 22-23 June 2016, EIP-AGRI Seminar, *Data revolution: emerging new data-driven business models in the agri-food sector*, Seminar Report, https://ec.europa.eu/eip/agriculture/en/content/eip-agri-seminar-data-revolution-final-report

[8] See AHDB (Agriculture and Horticulture Development Board), March 2016, 3rd party contribution to the TF

[9] See S. McCorriston, 8 March 2016, presentation to the TF. See also *The Transparency of Food Pricing Research Project (TRANSFOP) – EU 7th Framework Programme*, http://www.transfop.eu/, KBBE-265601-4-TRANSFOP

[10] See European Commission Communication, 9 December 2008, *Food Prices in Europe*, COM/2008/0821 final. See also *Food Price Formation* - 7th OECD Food Chain Network Meeting - October 2015,

afforded rather limited (price) information concerning the downstream stages of the supply chain whereas the primary producer prices are transparent. A missing link is prices - and their evolution - between processors and *their* downstream partners. This kind of data could provide information about the value of the farmer´s product as it is being processed and marketed along the chain.

30. The diagram below gives an overview of price availability throughout the food supply chain (green = high, red = low). While Eurostat provides price indices at producer, processor and retail level, these are available only for few, aggregated food chains (e.g. 'milk, cheese and eggs' or 'meats'). Price indices at more disaggregated level are only available for a few products and mostly only at the farm gate level.

	Means of production	Producer	Processor	Consumer
Absolute prices				
Indices for individual products				
Indices for aggregates				

4.3. Assessment

31. Well-functioning markets in agricultural products require an adequate flow of information between consumers, buyers and sellers at all stages of the supply chain.

32. All indications are that the Commission continues to have an important role to play in the collection (with the assistance of Member States), aggregation and dissemination of market information.[11] But the goal has been shifting from one of assisting the operation of measures of public market management to one of providing operators, in particular farmers, with information necessary for carrying out their business. Due to this shift, further efforts should be undertaken to adapt the data provided and increase its usefulness for market participants. For example, in addition to traditional market data, could data on input prices (animal compound feed, fertiliser, crop protection) be collected and disseminated on, say, a monthly basis?[12] This could help farmers to better manage their handling of input costs in the face of concentrated supply.

33. Standardisation and reliability, timeliness and ease of access are issues which should be prioritised and which strike us as candidate areas for improvements that could be cost-effective. Cost effectiveness is indeed a relevant consideration; some measures may increase transparency but imply too much effort and cost to be worthwhile pursuing.

34. Better coordination and integration of the EU information system with Member States' food price observatories should be pursued, so as to align approaches and make better use of data through synergies, common standards and comparability. For example, clear product definitions for price quotations are of central importance, including the type of product, stage of production and quality characteristics. 'Representativeness' of prices is a concept in need of precise specification if data is to be comparable. Quality of data, especially in the case of aggregated data is crucial, because market information available must be accurate and relevant to farmers lest their production decisions reflect misleading market signals.[13]

35. The information has to be available within a reasonable time for it to be useful for an

http://www.oecd.org/site/agrfcn/meetings/agrfcn-7-food-price-formation-paper-october-2015.pdf

[11] See FoodDrinkEurope, June 2016, 3rd party contribution to the TF, page 1

[12] See DPA (Dutch Produce Association), 3rd party contribution to the TF, March 2016

[13] See AHDB (Agriculture and Horticulture Development Board), March 2016, 3rd party contribution to the TF

operator. As regards producer price data, what is reasonable will depend on the frequency with which the prices are set in the supply chain or the frequency of transactions in physical markets. For production estimates and harvest progress, the information should be available at critical moments during harvest (or planting) and at regular intervals for products with a continuous production process.

36. Finally, if the information is to serve its purpose and lead to more informed production and marketing decisions, it has to be accessible for farmers. Farmers should be given the opportunity to access key data in formats that are easy to use (internet-based applications).[14] One-stop shop approaches such as the Commission's market dashboards are to be commended.[15] Explaining this information can be the role of farm organisations and interbranch organisations, and also partly the role of processors or retailers who develop long-term relationships with farmers. There is a role for public support of broadband internet in rural areas – a sine qua non – and targeted support increasing incentives for continuous professional education and farm advisory systems.

37. Currently, a lack of knowledge about prices and costs at the different stages of the chain undermines farmers' trust in the supply chain. One manifest current shortcoming is information on prices obtained by processors.[16] A system in which processor prices are also reported would provide redress and allow insight into price transmission and formation along the whole chain. The approach could make it possible to link the value of a product to the price it eventually fetches further downstream.[17] It could help address possible misperceptions and help explain the difference between producer and retail prices.[18] Dissemination of the collected information would have to be undertaken at the aggregate level though so as to protect business confidentiality.[19]

38. The experience in the US with mandatory price reporting in the livestock and dairy sectors (see box below) has demonstrated the feasibility of such a system.[20] Modern ICT in the logistics chain means that price information at the processing stage can be retrieved more rapidly and at a lower cost than in the past.[21] In the US, after initial reticence all market participants support the system and the perception is that efficiency has been enhanced.[22] The users of such information include producers, buyers,

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[14] See LTO Nederland, 18 March 2016, 3rd party contribution to the TF, page 1. See also Danish Agriculture and Food Council, 17 March 2016, 3rd party contribution to the TF

[15] European Commission, DG AGRI, http://ec.europa.eu/agriculture/dashboards/index_en.htm

[16] See for example Dutch Director General Agriculture and Nature, March 2016, 3rd party contribution to the TF. See also The International Meat Trade Association, 9 March 2016, 3rd party contribution to the TF

[17] See EDA (European Dairy Association), 5 March 2016, 3rd party contribution to the TF, page 2. See also recommendation (d) of chapter 8.

[18] Eurocommerce, 21 April 2016, 3rd party contribution to the TF, page 3

[19] *Ibidem*

[20] For analysis of the effects of mandatory reporting see e.g. K. Mathews et al., September 2015, *Mandatory Price Reporting, Market Efficiency, and Price Discovery in Livestock Markets, Livestock, Dairy, and Poultry*, Outlook No. (LDPM-254-01), http://www.ers.usda.gov/publications/ldpm-livestock,-dairy,-and-poultry-outlook/ldpm-254-01.aspx

[21] Wholesale Pork Price Reporting Analysis, commissioned by the Agricultural Marketing Service, United States Department of Agriculture, November 2009, https://www.agmanager.info/wholesale-pork-price-reporting-analysis

[22] Economic Research Service/USDA, March 2016, *Thinning Markets in U.S. Agriculture*, EIB-148, page 27

brokers, financial Institutions, exchange markets, insurance providers, and government agencies.

Price reporting in the United States[23] - The Market News (part of the US Department of Agriculture's Agricultural Marketing Service) has for its mission to "provide to the agricultural industry accurate and unbiased marketing information depicting current conditions relating to the trade of livestock, meat, wool, grain, and feedstuffs that will promote orderly marketing and enhance competition." Traditionally, it depended on voluntary market information, mostly collected by Market News reporters from public venues (such as auctions) and industry contacts.

In 1999, in response to the growing role of alternative marketing arrangements (forward contracts, formula pricing) and concentration in the livestock sector, mandatory price reporting was introduced. It was developed to facilitate open, transparent price discovery and provide all market participants, both large and small, with comparable levels of market information for slaughter cattle, swine, sheep, boxed beef, lamb meat (in 2010 extended to wholesale pork and dairy).

Processors, above a certain size threshold, are required to report electronically the price of each sale, along with quantity, and other characteristics (e.g. type of sale, item description and destination) that is used to produce timely, meaningful market reports.[24]

39. A further meaningful step would be to extend market transparency all the way downstream to the retail stage. The market orientation of agriculture requires a better understanding the demand for agricultural products.[25] Current information regarding product use and consumption is limited. A better understanding of the various trends in consumer demand would help identify areas where further added value can be generated - e.g. in terms of local, organic, free-range, GMO-free or antiobiotic-free production, as well as animal welfare standards and broad quality labels.

40. Although it is costly to collect data at the stage of individual retailers, , given the complexity and the diversity of supply chains[26], an aggregation on the basis of statistical data for some key products in the dairy, fruit and vegetables and meat sectors would constitute useful information concerning price transmission in the supply chain.

41. Some broad information about the situation could also be compiled in the form of simple aggregate indicators linking the amounts spent on food to the value added at farm level (such as the food dollar calculated by USDA or the food euro of the *French Observatoire de la Formation des Prix et des Marges*).[27]

42. Some Member States have created institutions that explicitly have a mandate to look into all the various stages of the supply chain (in Spain and France such organisations were created in recent years).[28] The experience of these organisations and their findings are relevant and should be shared.[29] Creating a forum for exchange of information at EU level would be a meaningful first step.

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[23] See C. Morris (US Agricultural Marketing Service, USDA), 8 March 2016, presentation to the TF

[24] For more information see https://www.ams.usda.gov/rules-regulations/mmr

[25] CEJA (Conseil Européen des Jeunes Agriculteurs), March 2016, 3rd party contribution to the TF, page 2

[26] See EuroCommerce, 21 March 2016, 3rd party contribution to the TF, page 7

[27] Observatoire de la formation des prix et des marges des produits alimentaires, https://observatoire-prixmarges.franceagrimer.fr/Pages/default.aspx; Economic Research Service (ERS), U.S. Department of Agriculture (USDA). Food Dollar Series, http://www.ers.usda.gov/data-products/food-dollar-series.aspx (March 2016)

[28] See C. Giner (OECD), 8 March 2016, presentation to the TF

[29] E.B. Oosterkamp et al., 2012, *Food price monitoring and observatories: an exploration of costs and effects; Summary and Executive Summary*, The Hague: LEI, part of Wageningen UR (LEI-memorandum: Markets & chains)

43. The breakdown of value added along the supply chain and especially the variations across Member States and over time will help benchmark the efficiency of various supply chains across the EU. It will help to disentangle static concerns, such as a low farm share in the food retail bill[30], from dynamic developments, such as technical change and growing consumer preferences for convenience and variety that lead to increasing value added in downstream stages of the supply chain. The value which operators add along the chain[31] - the 'marketing bill' - could be mapped.

44. The practical value of such data would also lie in making visible the developments and trends which are taking shape. It would allow a view of the whole supply chain and illustrate the changes in the respective weight of its various operators over time. It could help build nimbleness and resilience and enable informed and targeted investments and innovation.

4.4. Recommendations

45. In light of the above we recommend the Commission take the following action:

a. Introduce or enhance mandatory price reporting as a means to increase the transparency of prices especially in the meat, fruit and vegetables and dairy sectors. This should apply in respect of a few priority products and be undertaken in useful intervals.

b. Undertake and publish 'Food euro' calculations at EU level and Member State level for all major food products.

c. Review and improve the definition and standardisation - and thus the comparability - of the market data it collects.

d. Create a forum for better communication and exchange of information between Member States collecting market data and other food chain observatories. The existing market observatories for the milk and meat sectors are an important development. The collection of data should be modernised and data be made available more quickly.

e. Encourage Member States to modernise data collection by way of harnessing possibilities related to 'big data' generated on and off the farm.

f. Continue to focus on the dissemination of market information in readily accessible (internet-based) and user-friendly formats. The market dashboards to be found on DG AGRI´s website are a welcome evolution.

g. Examine whether and how the use of consumption data (especially scanner data) and input prices could be integrated into existing market information systems so as to complement the information that farmers can access.

h. Take appropriate action to help farmers - possibly via their professional organisations – to use the increasing amount of commercially relevant data available.

[30] European Competition Network (ECN), May 2012, *Report on ECN activities in the food sector*, pages 13, 18 and 26

[31] Handelsverband Deutschland, June 2016, 3rd party contribution to the TF, page 5

5. RISK MANAGEMENT

5.1. Introduction

46. Agricultural risk management is a broad concept which covers all possible[32] methods and instruments that are at the disposal of farmers in order to mitigate their commercial risks. It can be provided and facilitated through private or public instruments.

47. Potential risks can be categorised as follows:

- risks related to agricultural production (yields and quality) which are caused by environmental factors (e.g. animal and plant health) and weather induced events;

- risks related to agricultural market prices. These risks may inter alia be affected by inter-linkages with other commodities (e.g. oil, gas and minerals) and financial markets and other macroeconomic factors which influence dynamics (e.g. exchange rates, living standards) on both the supply and the demand side.

48. Risk management instruments can be put in place by both private and public interested parties (potentially working together) depending on the underlying market situation and can help reduce, mitigate or cope with risks and their consequences, ex ante or ex post. The potential of futures, a tool for use by private operators, is discussed in detail in Chapter 6.

5.2. Issue

49. Risks directly influence farmers' income perspectives and ability to stay in business. They may also have an impact on long-term planning and the decision to undertake competitiveness-enhancing investments.

50. The effective management of risks 'on farm' thus becomes imperative with a view to maintaining and enhancing the viability of the individual farm, rural economies, and the competitiveness and resilience of the EU agricultural sector as a whole.

51. Many Member States focus their risk management on ex post ad hoc payments devoted to crisis management funded through state aids.[33]

52. As regards tools whose use is supported by the EU, via the *Health Check* of 2008 the CAP offered for the first time the possibility to subsidise insurance schemes and mutual funds under the 'operational programmes' for the fruits and vegetables and wine sectors. In addition to that, Member States could choose to subsidise insurance premiums via their direct payment envelopes (with up to 10% of the envelope´s value).

53. However, it was only in the 2013 CAP reform that the EU legislator introduced a more comprehensive EU policy approach on risk management by anchoring it in rural development policy. The Commission reasoned as follows:

- given the heterogeneity of risks, background conditions and farm structures, it was decided to opt for a decentralised approach inherent to the governance

[32] In this report we only cover risk management measures other than all (normal) risk prevention and adaptation measures (such as diversification in production, seeking multiple outlets, saving accounts, etc.)

[33] See I. Bardají and A. Garrido, Study for the European Parliament, Research COMAGRI, March 2016, *State of play of risk management tools implemented by Member States during the period 2014-2020: National and European frameworks*, page 15

mechanisms of rural development policy - which provides Member States with flexibility to choose the appropriate instruments, budgetary allocations, and beneficiaries in line with the needs of their farmers and rural areas;

- the multi-annual programming approach provides budgetary certainty and stability.

- Member States/regions and farmers have an incentive to encourage or engage in better risk management because related funding from the EAFRD must be complemented by national/regional funding and by private contributions.

54. The current rural development policy 'risk management toolkit' is made up of the following three instruments:

- financial contributions to premiums for crop, animal and plant insurance against economic losses to farmers caused by adverse climatic events, animal or plant diseases, pest infestation, or an environmental incident;

- financial contributions to mutual funds to pay financial compensations to farmers for economic losses caused by adverse climatic events or by the outbreak of an animal or plant disease or pest infestation or an environmental incident;

- the 'Income Stabilisation Tool' (IST), taking the form of financial contributions to mutual funds that provide compensation to farmers for a severe drop in their income.

55. Beyond the above mentioned possible risk management tools already mentioned (covered by state aid and CAP rules) some Member States use fiscal means such as averaging profits over several years (normally a minimum of three years), for income tax purposes to take account of the specific characteristics and production uncertainties of the agricultural sector which lead to fluctuating profits not typical in other sectors.[34] These measures aim to incentivise farmers to manage risks on-farm by enabling them to build reserve funds and avoid incentives for on-farm 'over-investing'.[35]

5.3. Assessment

56. As of yet, there is no harmonised EU-wide agricultural risk management scheme. What is more, the uptake of the EU risk management toolkit by Member States is limited.[36] Less than 0.5% of the CAP budget is used for this (while direct payments account for 60%). This may be due - among other things - to the differences in agricultural risk profiles of Member States and the fact that a common policy approach at EU level is relatively recent.

57. Risk management involves a triangle of interested parties: farmers and their professional organisations/intermediaries, market actors such as insurance and reinsurance companies and

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[34] See for instance the UK's recent extension to five years of the possibility to average out farm profits. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442898/Income_Tax_-_Extension_of_averaging_period_for_farmers_-_Consultation.pdf. In France the *Dotation Pour Aléas* (*épargne de precaution*), which exists since 2001, is fiscally privileged. France has suggested introducing a mandatory precautionary savings scheme at EU level (see 25 May 2016, *A reformed CAP for competitive, sustainable and resilient agriculture*, contribution on CAP post 2020 to informal Council meeting, page 6

[35] Landwirtschaftskammer Österreich, 7 September 2016, 3rd party contribution to the TF, point 4(c)

[36] See I. Bardají and A. Garrido, Study for the European Parliament, Research COMAGRI, March 2016, *State of play of risk management tools implemented by Member States during the period 2014-2020: National and European frameworks*, page 15

public policy makers. Depending on various factors (geographical area, degree of business orientation, risk profile, availability of ex-post compensation), the level of awareness of the existence of risks and of the actual need for pro-active risk management varies substantially within the farming community.

58. There is a certain reluctance from farmers to individually engage in risk management schemes. Various reasons for this are normally referred to, such as the unwillingness to pay important amounts of money upfront without knowing whether there will be a 'return on investment', the existence of ex post public support which dampens incentives for an ex ante individual risk management approach, and the delays in pay-outs[37] as well as the wide variation (mostly because of cultural/regional drivers) in willingness to collectively engage in risk management for instance via the creation of mutual funds.

59. On the other hand, most stakeholders agree on the necessity for farmers to engage more actively in on-farm risk management business strategies, in particular in light of the more open and global economic market environment in which EU producers are operating in and also because of possible increasing weather-related risks due to climate change.

60. An integrated risk management approach should therefore be encouraged. It should cover the various layers of risks, which should be treated – including by public actors - according to their particular features. The creation of 'red tape', when verifying losses and reimbursement entitlements, should be avoided; index-based approaches that operate via reasonable proxy measurements (and can be assisted by new technologies such as remote sensing) may prove helpful in doing so.[38]

61. A few Member States have invested in such integrated risk management policies (see box below/overleaf/opposite).

In **Spain** a well-developed model of weather and nature-related risks, the so-called Combined Farm Insurance System, has been set up. Its origins go back to 1978. At the core of the system is a pool of private insurance companies. However, the public administration conducts - in coordination with the private sector – the necessary technical studies in order to define risk coverage conditions and premium calculations. Also important to note is the fact that the system is reinsured on the international market by a Spanish public-private insurance organisation.

Hungary is another example of a Member State which operates a well-developed national risk management system, in which a close cooperation between the public administration, insurance companies and mutual funds has ensured a high-performing risk management system. The foundation of the current system was laid down in 1997 and has since then continuously improved. Files are being fully 'web-handled', starting from the electronic claim declaration for farmers using a mapping system up to the site inspection verification by electronic technology (geographic information system), to the final electronic notice of official decisions about damage mitigation and the actual insurance premium subsidy paid out.

62. These examples are the exception to the rule. In most other Member States actual uptake by individual farmers of private or publicly financed risk management schemes is low, leaving it to cooperatives[39] or farmers´ associations to take the initiative to develop their own sector-specific risk management tools and to encourage their members to get involved. Private

[37] See Sodiaal (French cooperative), 18 October 2016, 3rd party contribution to the TF - *Note sur la gestion des risques*, constat 4

[38] See CIBE (International Association of Beet Growers), 26 October 2016, 3rd party contribution to the TF, page 3

[39] See P. Dusser, 4 October 2016, presentation to the TF, slide 4 and following

initiatives have the advantage of not having to align themselves with the rules of the rural development policy legislation regarding minimum thresholds[40], and monitoring of individual economic losses. Because they are not so aligned, they are foregoing EU public support, a fact which increases farmers' cost which may in turn account for low participation rates.

63. Besides the role of the public authorities, an important actor in order to have well-functioning private risk management schemes is insurance companies.

64. Insurance schemes are the most apt to address weather related risks from an ex ante point of view. In contrast, systemic risk (e.g. market) increases the potential for very substantial pay-outs and thus reduces the attractiveness for insurance companies to invest in such portfolios. If insurance companies cannot pool enough farmers with preferably different risk profiles, the insurance premiums may end up being unaffordable for farmers.

65. As regards the actual involvement of farmers in mutual funds, the obstacles are multiple. First of all, a mutual fund (if not set out by Member State legislation) can only be created via a cooperative or other form of a genuine farmers´ association. This requires a sense of solidarity and willingness to create a common savings fund that kicks in, potentially, only at a later stage. Beyond this, for the mutual fund to run efficiently, a high degree of professionalism/entrepreneurship is required in order to manage the system of compensation for production and income losses. The latter type of loss is the more complex as it involves monitoring individual farmers' economic accounts. Furthermore, it is clear that there are significant capital needs for a well-functioning mutual fund/IST and, hence, sound financial skills are needed.

[40] There is a minimum loss threshold (30%) for Green Box compliant subsidised risk management schemes.

5.4. Recommendations

66. The following actions are in our view vital if the EU wishes to invest in improving the uptake of risk management schemes in Member States:

a. Invest in education, training, knowledge transfer etc., via the mandatory inclusion of advice on farm risk management business strategies in the EU´s Farm Advisory Service scheme.

b. Explore mandatory inclusion by Member States of action promoting on-farm risk management strategies in their rural development programmes.

c. Set up an EU platform including Member States, sectors and other stakeholders allowing the exchange of best practices concerning agricultural risk management.

d. Explore the possibility to use indices (proxies) and other technically and actuarially viable models for calculating losses and reimbursements, possibly managed by sectoral organisations.

e. Analyse whether the thresholds set for crop insurance could be revised to render such insurance more attractive for users.

f. Explore the possibility for EU co-financing of reinsurance schemes.

g. Invest in sound monitoring and evaluation systems (at EU and Member States level) in order to be able to map all relevant data linked to occurrence of risks, yield variations, disease outbreaks etc. for use by private and public entities enabling a

matching availability of risk management products in line with actual needs.

h. Explore ways of exchanging information on and harmonising Member States' existing practices of tax averaging (> three years) and similar fiscal measures in favour of agricultural producers.

i. Explore the possibility to shift CAP resources to make it possible to develop and fund a strategic EU risk management policy (see Part III) which should be complementary to and coordinated with Member States´ systems for agricultural risk management and allow Member States the necessary flexibility to address their specific needs.

j. Given the heterogeneity of risk, conditions, and farm structures, it is appropriate to allow Member States flexibility in selecting the instruments (mutual funds or insurance systems) to program the EU's Income Stabilisation Tool. This should facilitate the evolution of current national risk management strategies and apply the same conditions to national aids under national risk management schemes as apply to the EU risk management instruments.

6. FUTURES AND OTHER DERIVATIVE INSTRUMENTS

6.1. Introduction

67. A futures market is an organised market for trading highly standardised contracts for the future delivery of a commodity at a price determined today. A futures market can be contrasted with a cash or spot market where products are immediately delivered and paid for. Futures can be settled with physical delivery or settled in cash.

68. Futures contacts evolved from forward contracts (private, tailor-made agreements). Forward contracts on agricultural products were developed out of necessity to manage risk during the Bronze Age as farming communities grew into a larger society with separation of producers and consumers. Numerous clay tablets made in Mesopotamia around 1900 BC are forward contracts with complete specifications. The modern futures markets began with the growth of commercial trade in grain, in the US in 1848.[41] Even as other derivative markets were temporarily outlawed or heavily regulated after speculative débâcles, derivative markets for commodities and specifically for agricultural products were kept as being too important for producers, downstream companies and consumers to do without.[42]

6.2. Issue

69. Properly functioning futures markets carry the potential of usefully underpinning a market-oriented agricultural policy. This potential may well become more important as the use of traditional public market measures is reduced. A futures market provides a place for hedging (offloading market price risk), for price discovery[43] through being a competitive and low-cost market. The participants in the market are hedgers such as farmers on the producing side and processors and consumers on the other. Since these do not often have a simultaneous interest to trade with each other and because the amount offered on the producer side is often not

[41] J. Lurie, 1979, *The Chicago Board of Trade 1859 – 1905 The Dynamics of Self-Regulatio*n, University of Illinois Press

[42] E. Swan, 2000, *Building the Global Market – A 4000 Year History of Derivatives*, Kluwer Law

[43] Price discovery is the process of determining the price of an asset in the marketplace through the interactions of buyers and sellers.

equal to the amount needed on the consumer side, there is a need for investors[44] willing to carry a risk[45]. Some investors specialise in arbitrage between a physical market and a futures market which guarantees convergence and correlation between them. Without intermediaries such as exchanges, clearing houses, brokers and advisor banks providing the transaction infrastructure, none of this would work.

70. In countries where agricultural commodity prices fluctuate widely farmers have used futures for a long time. In the EU, futures markets are liquid and widely used in the grains, oilseed, processing potato and sugar sectors. Futures markets for milk powder, butter and pigmeat are fairly recent 'innovations' in Europe; they have existed for little more than six years and are therefore still in an introductory or growth phase.

71. It takes some time to develop a functioning futures market. Most of the time the volume of traded contracts increases gradually and some contracts never take off. The success of a contract depends on joint work and effort from all actors (both contract providers and the various categories of users)[46] and it often presupposes a cultural change.

72. The main challenges involved in setting up and developing futures markets are:

- lack of information about the physical market, in particular lack of price transparency (representative market price) which is necessary for cash-settled contracts.[47] Moreover, market participants need adequate and regular information on supply and demand levels;

- limited knowledge and poor public perception of futures markets (futures markets are often associated with 'speculation'), which can lead, inter alia, to public policy measures which undermine futures markets;

- limited financial resources on the part of operators seeking to use futures;

- insufficient product standardisation, which limits the development of the depth of the market.

- futures contracts will not develop and last if there are problems with market integrity and convergence.[48] If a market is manipulated or the price of the future at its expiry date does not converge with the spot price of the product liquidity quickly dries up and contracts disappear from the market;

- lack of storage capacity at farms and cooperative level creates an obstacle for creating a proper strategy for futures markets;[49]

- public intervention in a physical market may disturb market signals and alter risks –

[44] Investors range from private investors to pension funds who are able to diversify a commodity specific risk with other assets. A small and emerging derivatives market will have to rely more on private investors, since large investors require the size of a more developed market.

[45] J.M. Keynes, *A Treatise on Money*, Harcourt Brace and Company, 1930

[46] See CME Group, 10 May 2016, 3rd party contribution to the TF, page 3

[47] Cash settlement is the process by which the terms of a futures contract are fulfilled through the payment or receipt of the amount of money as opposed to delivering or receiving the underlying product/stock.

[48] See FoodDrinkEurope, June 2016, 3rd party contribution to the TF, page 3

[49] See Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, pages 9-10

in particular if the intervention is not predictable and transparent - interfering with the development of private sector risk management instruments;

- futures also have limitations and do not work in all sectors (like wine, olive oil, fruits, vegetables).

73. Access to and use of futures require significant preparation and knowledge. If used imprudently futures can result in even greater risk than the exposure futures are supposed to mitigate.[50] Therefore, farmers or their groupings who want to use futures are well advised to put in place an appropriate internal risk management system with sufficient trading controls as well as internal accounting rules. A lack of knowledge is one of the major reasons for limited use of futures by farmers. Often farmers are deterred by the time and cost involved in the necessary learning process.

74. Using futures also requires access to significant cash resources to cover the initial margin and variation margin (see Annex A for more details).[51]

75. Adequate contract specifications play an important role in the success of a futures contract. For contracts with physical delivery it is important to make provision for a sufficient number of delivery points to closely reflect physical market reality.

76. One of the challenges in developing liquid futures markets is attracting a sufficient number of users. To attract them one needs a credible and representative market price of the product concerned and a well-functioning financial services infrastructure. Liquidity could also be increased if more forward contracts traded over-the-counter (OTC) would move onto regulated platforms (exchanges). This is increasingly happening as a consequence of the new financial legislation which has recently been put in place (EMIR[52]). However, not all OTC or forward markets are suitable for exchange-traded futures trading. Forward (OTC) markets sometimes exist mainly at wholesale level with large trading sizes or are too small to attract the necessary large investment in exchange infrastructure of a futures exchange. In order to create and develop new futures market, stakeholders in a sector should use deferred delivery contracts and standard contract terms in their business. This is a first step to setting up futures market. Once futures markets exist, operators on the physical market should use basis contracts which allow to link the transaction on the physical market and the hedging transaction on the futures market. This type of contract should be designed by brokers, sellers and buyers together.

77. Financial legislations such as MiFID II[53], MAR[54], Basel II and PRIIP[55] - whose objective is, inter alia, to increase the integrity of financial markets - could have some unintended side-effects on liquidity or the actual availability of financial services.

78. Producers, processors and traders - but also financial actors - are needed to bring sufficient liquidity to the market. Treating the

[50] See AHDB (Agriculture and Horticulture Development Board), May 2016, 3rd party contribution to the TF, page 3

[51] *Idem*, page 5.

[52] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), OJ L 201, 27.7.2012, p. 1–59

[53] Directive (EU) No 2014/65/EU of 15 May 2014, OJ L 173, 12 June 2014, p. 349–496 and Regulation (EU) No 600/2014, OJ L 173, 12.6.2014, p. 84–148

[54] Regulation (EU) No 596/2014 of 16 April 2014, OJ L 173, 12 June 2014, p. 1–61

[55] Regulation (EU) No 1286/2014 of 26 November 2014, OJ L 352, 9 December 2014, p. 1–23

latter as 'speculators' in the derogatory sense of the term and hampering their investment by dissuasive regulation actually leads to a tangible loss of liquidity and structure for futures markets in agricultural products.

79. We have focused this discussion on futures markets but there are also other derivative instruments which play a similar role (see Annex A for further details).

6.3. Assessment

80. Properly functioning futures markets can offer an important risk management tool for farmers in times of increased price volatility.[56] They provide a means of shifting or sharing the risk of price changes. Farmers can lock-in margins, thereby creating the necessary stability for forward planning.[57]

81. While futures can protect market participants from the impacts of short-term price volatility they are less effective in protecting against prolonged periods of low prices.

82. Futures are however the most suitable risk management tool for farmers that can not only reduce the risk which farmers face but also improve the competitive position of the farmer in a globalised market. Futures in specific European products allow downstream companies to manage risk associated with buying agricultural products from farmers in the EU. The possibility to offer a potential buyer not only a spot price, but also a fixed price for future delivery gives a competitive advantage. While some futures contracts listed outside the EU can be used, certain EU products are too specific and require the creation of European futures or OTC derivative markets. For some small derivative markets, such as new markets in an introduction phase OTC contracts are often more suitable since they do not require an initial investment in exchange infrastructure.

83. Futures markets and market transparency are closely interlinked. A well-functioning futures market can significantly improve price transparency and provide valuable and inexpensive information for all market participants, including those who do not trade on the commodity exchange.[58] This price discovery effect is especially useful for farmers as it strengthens their competitive position in relation to bigger and better informed operators in the supply chain.

84. Farmers will normally access and transact on futures markets directly through futures brokers or indirectly via their cooperatives. Cooperatives or agribusiness make forward delivery contracts available to farmers. The pricing of a contract is based on futures markets.

6.4. Recommendations

85. Here is a list of steps that should be taken by the Commission to help futures markets develop - where they are desirable and do not yet exist – so that farmers can use them to manage their price risks:

a. Require/encourage Member States to make funding available under their rural development programmes for practical training for farmers/cooperatives on how to use futures.

[56] This includes price volatility of agricultural inputs. See the creation of a nitrogen fertiliser futures contract by Euronext (starting date 14 November 2016).

[57] See B. Teuwen (DLV Market Advisory), 12 April 2016, presentation to the TF

[58] See UK Department for Environment Food & Rural Affairs, 10 May 2016, 3rd party contribution to the TF, page 3

b. Initiate and facilitate cultural change by rolling out information and promotion campaigns that aim to level-headedly provide information about futures (counteracting the simplistic tendency to see futures as a complex financial tool benefitting mainly speculators).

c. Provide technical advice concerning the risks that too restrictive financial regulation and regulatory technical standards can have on the prospects and viability of futures markets. Futures market cannot exist without speculators, investors and financial intermediaries who can offer market access at reasonably low thresholds of cost and administrative burden. It is important to bring actors together and to share best practices.

d. Encourage commodity exchanges to put in place market maker programmes so as to stimulate liquidity in the early days of a new futures contract. Require/encourage Member States to mobilise funding for designing new futures markets meeting the needs of stakeholders.

e. Promote the setting-up of credit or guarantee funds in Member States to facilitate access to futures for farmers/cooperatives which would experience difficulties in covering the margin calls (for example through a pool funded via financial instruments supported through rural development programmes).

f. Ensure that price monitoring systems promote the identification and timely dissemination of representative market spot prices for given products which can be used as reliable and accurate reference values that cash-settled futures contracts can incorporate (these systems should include proper procedures for verifying and guaranteeing the robustness of the underlying data).

g. Develop and 'spread the word' about specifications for the main products that should benefit from the existence of viable futures markets (for example an EU standard for certain types of cheeses could help to develop cheese futures[59]).

h. Assess the impact of public intervention in markets on the perceived integrity of a given agricultural market. Sudden changes in public policy may have a detrimental effect on the development of a futures market. A stable policy environment favours commodity exchanges' provision of new contracts.

7. TRADING PRACTICES IN AGRICULTURAL MARKETS

7.1. Introduction

86. We use the terms 'contractual relations' and 'trading practices' as referring to the commercial relations between the operators in the food supply chain. At their core lie sales arrangements normally based on a contract or a longer-term contractual framework established between the parties concerned. Contracts can be written or oral. Trust, commercial dependency on one´s trading partner, economic weight and the competitive ability of actors are important elements that shape such arrangements and their implementation and thus influence the functioning of the supply chain. A healthy market is characterised by an 'ecosystem' composed of stakeholders of various sizes with an ability to compete with each other.

[59] See Eucolait, 17 June 2016, 3rd party contribution to the TF, page 3

87. Unfair trading practices (UTPs) can be defined as practices that grossly deviate from good commercial conduct and are contrary to principles of good faith and fair dealing. Examples of such practices are unduly late payments, unfair shifting of business risk to the other party, unilateral or retroactive changes to contracts and unfair termination of contracts.

88. A Commission report from January 2016[60] refers to:

> *"[...] four key categories of UTPs that an effective regulatory framework should target:*
>
> *- one party should not unduly or unfairly shift its own costs or entrepreneurial risks to the other party;*
>
> *- one party should not ask the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked;*
>
> *- one party should not make unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions;*
>
> *- there should be no unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship."*

89. UTPs can occur at all stages of the supply chain. UTPs originating at one level of the chain may have effects on other parts of the chain depending on the market power of the actors involved. Such effects are often particularly visible in the case of farmers. Small and medium-sized enterprises (SMEs), at producer and processor level alike, might be particularly vulnerable due to their resource limitations, asset specificity and high switching costs.

7.2. Issue

90. Within the food supply chain, significant imbalances in bargaining power exist between contracting parties.[61] Such imbalances may encourage certain behavioural practices on the part of the stronger party in a given commercial relationship or transaction.[62]

91. The problem of UTPs has been acknowledged by all stakeholders in the food supply chain.[63] A number of surveys show that UTPs occur relatively frequently, at least in some parts of the supply chain. It was reported that the vast majority of suppliers have experienced UTPs.[64]

92. A well-functioning efficient supply chain with a high level of transparency and working price transmission is vital for an economically

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[60] European Commission, 29 January 2016, *Report on unfair business-to-business trading practices in the food supply chain*

[61] *A better functioning food supply chain in Europe*, Communication from the Commission. See also European Competition Network (ECN), *Report on ECN activities in the food sector*, May 2012, paragraph 188

[62] See Copa Cogeca, 3rd party contribution to the TF, 5 July 2016, page 2. See also DG COMP, *Synopsis of Member States´ national competition authorities contributions on the milk supply chain*, 23 November 2009, page 18, for the milk sector.

[63] German Retail Federation, June 2016, 3rd party contribution to the TF, page 5. NFU (UK National Farmers Union), 15 August 2016, 3rd party contribution to the TF, page 6. See also European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, page 13

[64] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, page 3

sustainable farming sector.[65] UTPs lead to inefficiency and negatively affect operators who are otherwise commercially viable.[66] They create uncertainty, thus stifling innovation and are liable to cause underinvestment in the supply chain.[67]

93. Beyond bargaining power imbalances, national business culture plays an important role in commercial customs, habits and practices, including those that are deemed unfair. The definition of what is a UTP may differ according to the national situation and business culture.

94. The food supply chain has specific characteristics which distinguish it from several other industrial sectors and which make UTPs particularly problematic (see box below).[68]

Some characteristics of the food supply chain in Europe - The primary processing stage in the supply chain generally consists of larger enterprises in key sectors such as dairy, meats, cereals and sugar. This stage is to a large extent controlled by cooperatives, in particular in northern Europe, and they play a very relevant role in this context. This applies in particular to the dairy sector but the cooperative structure is also important in sectors such as grain, fruit and vegetables and meat. A sizeable share of agricultural commodities is processed by secondary processors into consumer products. The structure of the industry is mixed with some very large consumer brand processors as well as SMEs for specialised and/or perishable products. In many sectors, the market is dominated by one or two large processing companies.

The retail end of the supply chain consists increasingly of large retail chains but small chains and independent retailers also continue to exist. The stages of processing (especially secondary processing) and retail in the food supply chain are, in terms of value added, generally characterised by a high degree of concentration. In comparison, farmers (and to some extent primary processors) are fragmented, notwithstanding producer cooperation and policy measures encouraging it. There are economic reasons and in-built constraints that tend to determine and condition the respective structures of these stages of the supply chain.

Many farmers have general delivery terms with the processing industry governing when a product is delivered. The purchaser sets several quality parameters. For example the quality of raw milk delivered is verified by an independent third party (e.g. laboratory) and the verification process is paid for by the dairy; the classification of a carcass is undertaken by a third party and paid for by the slaughterhouse.

In case of disagreements on price and quality, producers of storable agricultural goods like cereals can seek better business opportunities elsewhere and are thus less exposed to asymmetric economic power. Farmers producing perishable products, e.g. raw milk or fruit and vegetables, have limited options if there is a disagreement about, say, the quality classification. They have no option, at least in the short term, but to deliver the product ('hold-up situation').

95. Written contracts do not always exist (see discussion in paragraph 121) and some UTPs are 'extra-contractual'. Where contracts exist they may be general and leave room for interpretation, whereas, ideally, they should be clear and specify all the commitments of the parties involved.

96. UTPs that are particularly detrimental to micro-enterprises are late payments (see box below)[69] and retroactive claims for payments not

[65] European Competition Network (ECN), *Report on ECN activities in the food sector*, May 2012, pages 101-106 for the dairy sector

[66] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, page 3

[67] European Competition Network (ECN), May 2012, *Report on ECN activities in the food sector*, paragraphs 226 and 254, page 118 (UK findings)

[68] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, page 5

[69] When the owners of the first processing (cooperative) industry are the farmers the problem perceived with late payment is likely to be less consequential - it can be addressed with other than legislative means. See Report 3.

included in the contract (for example financing of marketing campaigns). EU legislation on late payments exists but allows relatively long payment periods. This is not appropriate for all sectors, for example fresh products which are sold shortly after delivery and for which consumers pay immediately in the shops.[70]

Periods for payment[71] - Maximum payment periods are set by the Late Payment Directive (2011/7/EU). It was transposed into national legislation the following years. The Directive has been in force for a relatively short time. The maximum payment term stated in the directive is 60 days. Several Member States have opted for stricter payment conditions than the minimum required by the Directive. Some Member States have promoted agreements on codes and voluntary sectorial initiatives to tackle negative effects of late payments.

Long payment periods have the tendency to be passed on along the food supply chain. While this also happens in other supply chains, farmers (most of which are very small enterprises) are more likely to have difficulties in finding external financing - which makes them vulnerable to liquidity constraints. According to the 2016 ex-post evaluation almost three out of four companies in Europe have experienced late payments in the last three years preceding the evaluation.

At the retail or Hotel/Restaurant/Café level of the supply chain, on-the-spot payments by customers to retailers or restaurants are the rule; purchases on credit or against invoices are less common. Cash/liquidity is therefore available downstream of the chain as soon as the product is sold. Shorter payment periods throughout the chain would therefore seem realistic, and would be particularly desirable for fresh products.

Although the right to claim compensation for late payments exists under EU law, only 60% of the companies participating in a survey answered that they have de facto claimed interest or compensation for recovery costs. A reason given for not claiming compensation is the fear of damaging the business relationship.

97. In general, UTPs are liable to hamper the development of economically viable farmers and processing SMEs in the supply chain. UTPs increase the commercial risk of the party which is the victim of the UTP in question and may eventually give rise to inefficient production decisions or discourage operators from engaging in commercial relationships.[72]

98. It does not, therefore, come as a surprise that in 20 Member States various legislative initiatives address UTPs.[73] Together with the existing voluntary Supply Chain Initiative (SCI) this has had a positive impact on the functioning of the supply chain. None of the existing voluntary or national approaches, either in combination or alone, has so far solved the issue of UTPs - although there are national models with public control of UTPs, voluntary initiatives and self-assessment tools which offer good prospects.

from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, COM/2016/0534 final

[70] See Copa Cogeca, 7 June 2016, *Promoting farmers and agri-cooperatives positioning in the food supply chain*, 3rd party contribution to the TF, page 4

[71] See European Commission, 26 August 2016, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions*, COM(2016) 534 final

[72] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, page 3

[73] European Commission, 29 January 2016, *Report on unfair business-to-business trading practices in the food supply chain*, page 2

7.3. Assessment

99. A fully satisfactory solution to UTP may be impossible to find at the EU level. Having said this, the question arises whether there could be improvements compared to the current piecemeal approach to UTPs in the supply chain. Can a basic common denominator of the most detrimental UTPs be found? Could there be some basic procedural rights for a complainant addressing some of the shortcomings of current attempts at preventing UTPs?

100. Diverging national legislations in the domain of the single market have traditionally been an indicator of a need to provide a common EU framework or at least a baseline for harmonisation and cultural change.[74] Many operators - in particular in the processing and retail sectors - have business operations in several Member States where steps towards harmonisation of the legislative framework and its implementation and monitoring may actually lead to efficiency gains and a reduced administrative burden.

101. It would indeed be useful to have a framework of UTP rules laid down at the EU level building on the existing Article 168 CMO. An EU framework should include basic and indispensable UTPs that could apply horizontally. It should also cover basic conditions concerning enforcement in Member States. This would give victims of UTPs a much needed anchorage in EU law while being mindful of particular features of national UTP rules. It is, however, important to recall that not each instance of driving a hard bargain constitutes an unfair trading practice; national UTP legislation above and beyond the baseline must comply with EU law on the single market.

102. We are under no illusion that such legislation will be a panacea for imbalances of bargaining power in the supply chain.[75] There is no silver bullet that will lead to instantly higher prices, perfect price transmission and a more balanced distribution of added value along the chain. But sensible framework legislation can help the cause of incrementally strengthening the position of farmers and SME processors in respect of UTPs, a promise that the voluntary codes have failed to make good on. A light touch in terms of the institutional set-up should keep the administrative burden on Member States in check.

103. An exhaustive common legislative list of UTP is difficult to draw up because of different perceptions of what is detrimental in Member States. What is more, such a list risks being outdated quickly.

104. In our view, therefore, only a few basic UTPs, common to most Member States regimes, should be outlawed at the EU level.

105. Again, such a framework could accommodate national differences in business culture by giving Member States' leeway to regulate above and beyond the baseline Unfair Trading Practices, subject to existing limits under EU rules safeguarding the internal market as well as competition. Member States that encounter Unfair Trading Practices only rarely or not at all could choose not to use the above-mentioned leeway.

106. The useful complementary role of voluntary arrangements should be underscored. The High Level Forum has been playing an important role in the creation of the SCI.

[74] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain*, pages 5-6

[75] See Nederlandse Akkerbouw Vakbond, 22 June 2016, page 1, stressing the impact of (over-)supply and demand on the relative positions of the actors in a given commercial transaction. See also Handelsverband Deutschland, 3rd party contribution to the TF, June 2016, page 2

However, producers decided not to join the Supply Chain Initiative (SCI) mainly because of confidentiality ("fear factor") and enforcement concerns.[76] An advantage of voluntary arrangements is that amendments and updates can be implemented relatively quickly, in particular via national platforms. [77] Voluntary codes can become a standard of reference for enforcement in addition to the EU baseline and Member States' rules.

107. Central elements of a working "UTP regime" are enforcement of rules and the monitoring of this process. Rules have doubtful value if they are not enforced or are not enforceable.

108. 'Normal' enforcement, that is to say the process of acting upon complaints from victims of UTPs in courts has come up against what has been called the "fear factor": the weaker party is unable to make effective use of its rights as it is unwilling to lodge an 'official' complaint for fear of risking the business relationship.[78]

109. So as to overcome this problem, some Member States have adopted specific arbitration regimes managed by independent authorities (examples are Spain and the United Kingdom) which can undertake own initiative investigations that do not lead to the disclosure of the identity of a complainant. The UK, for example, has set up a public authority in the form of a *Groceries Code Adjudicator*[79], similar to an Ombudsman.

110. Even Member States which do not currently entrust a public body with the task of monitoring and pursuing UTP could do so by relying on existing structures and authorities rather than by creating new ones. For instance, special chambers of courts, consumer protection agencies or national competition authorities could be entrusted with this role.

111. Such bodies could also adjudicate or mediate disputes based on rules included in voluntary codes of good practices - perhaps if (and after) the primary resolution mechanisms set out by such regimes fail to resolve the dispute.

112. Last but not least, the ability to sanction misconduct is important for dissuading non-compliant behaviour. Most Member States have introduced the possibility to impose fines on companies implementing UTPs in breach of national laws. Although it is difficult to set an appropriate level of the fine, such fines should be proportionate to the gravity of the conduct and its potential harm to the victim and ought to outweigh the benefits that could be obtained by resorting to UTPs.[80]

7.4. Recommendations

113. In light of the above analysis we advise the Commission to propose the following measures:

a. Introduce EU framework legislation and a harmonised baseline of prohibited UTPs in Member States to be laid down in the CMO. The following concrete rules should be part of this baseline:

[76] Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, page 2

[77] Handelsverband Deutschland, June 2016, 3rd party contribution to the TF, page 9

[78] European Commission Communication, 15 July 2014, *Tackling unfair trading practices in the business-to-business food supply chain* , page 7

[79] *Groceries Adjudicator Act*, 25 April 2013. See also NFU (UK National Farmers Union), 15 August 2016, pages 6-7.

[80] European Commission, 29 January 2016, *Report on unfair business-to-business trading practices in the food supply chain*, page 7

i. no payment periods longer than 30 days;

ii. no unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices);

iii. no contributions to promotional or marketing costs;

iv. no claims for wasted or unsold products;

v. no last-minute order cancellations concerning perishable products;

vi. no requests for upfront payments to secure or retain contracts.[81]

These UTPs should not be subject to the contractual autonomy of the parties concerned.

The beneficiaries of such rules should be farmers, including their professional organisations as well as SME processors as regards transactions with their downstream trading partners in the supply chain.

b. Provide for effective enforcement of UTP rules, be they EU baseline rules, Member State rules or possibly voluntary codes. An independent authority should be set up in Member States which can enforce its decisions.

c. Enforcement should make it possible to overcome the fear factor. To this end:

i. Victims of UTPs should have the possibility of lodging anonymous complaints.

ii. Producer organisations (POs), associations of producer organisations (APOs) and cooperatives should be allowed to lodge complaints.

iii. Enforcement bodies should be able to conduct own-initiative investigations.

iv. Yearly reporting on enforcement activities should be carried out so that policy makers can monitor the impact of the framework.

d. Sanctions for non-compliance should be possible and should have dissuasive character. Framework legislation at the EU level could provide guidance in this field.

e. Facilitate, at EU level, a platform for exchange of experience and practices between enforcement bodies such as it exists for instance in the field of competition law (the European Competition Network).

f. Procedural rules should provide viable tools for handling cases of transnational UTPs, that is to say cases in which buyers originate in a country different from that of producers or processors.

g. The Supply Chain Initiative should be continued and improved so as to render it more effective and attractive, including for farmers.

[81] These payments favour large suppliers which have the financial resources to pay very large payments and thus lock out SME suppliers.

8. USE OF CONTRACTS ('CONTRACTUALISATION')

8.1. Introduction

114. The term "contractualisation" is rarely or never used in standard English[82], but is nonetheless deployed in some international contexts to refer to the widespread use of contracts to regulate sales between farmers and their customers.

115. In practice, the way individual contracts between agricultural producers and their business partners are shaped differs significantly and often depends on the sector.[83] Some contracts offer flexibility, whereas others govern the commercial transaction in detail. Some are written, others oral.

116. The spectrum of commercial contractual relationships between farmers and their customers ranges from spot market transactions to vertical integration. Vertical integration may render contracting superfluous thanks to the full integration of production and processing in one single operator who bears the commercial risk. It also can create high dependency, as it does in the poultry industry. The closest form of vertical cooperation short of vertical integration constitutes 'contract farming', in which production takes place on the basis of quality and delivery requirements specified by the buyer.[84]

117. Cooperatives constitute a specific case as farmers are the owners of the cooperative. In the case of cooperatives the relationship between the producers (members of the cooperative) and the cooperative with regard to deliveries is normally regulated via the cooperative´s statutes.[85]

118. A distinction can be made between contracts between individual primary producers and their respective trading partners and contracts which are negotiated by producers collectively with their downstream partner(s). Individual contracts can be concluded on a stand-alone basis or in the context of a collective framework contract[86], such as the delivery contracts in the sugar sector following an 'agreement within the trade' (as provided for by Article 125 CMO).

119. 'Framework contracts' negotiated by producer organisations or associations of producer organisations[87] can counterbalance the

[82] By contrast, 'contractualisation' is well established in French.

[83] CEFS (Comité européen des Fabricants de Sucre), 19 September 2016, 3rd party contribution to TF, page 1, points out that the high degree of contractualisation in the sugar sector is due to the closely integrated nature of the sector and the mutual dependence of farmers and processors. See also overview for various sectors, Y. Tregaro, FranceAgriMer, 24 May 2016, presentation to the TF, showing how contractualisation adapts to the nature of the product, in particular to its (non)perishable nature.

[84] For an overview, see FranceAgriMer, July 2011, *Production animale et contractualisation, histoire et enjeux*, No. 8, http://www.franceagrimer.fr/content/download/6872/39514/file/contract-07-2011.pdf

[85] Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, page 3, underlines that for that reason the cooperative model should be safeguarded from any legislative contractual changes.

[86] The framework contract is often referred to in the individual contract and legally forms part of the individual contract relation.

[87] CGAAER (Conseil Général de l'Alimentation de l'Agriculture et des Espaces Ruraux), December 2015, *Mise en œuvre de la contractualisation dans la filière laitière française*, http://agriculture.gouv.fr/sites/minagri/files/cgaaer_15053_2015_rapport-2.pdf, page 69 pleads in favour of strengthening the development of larger producer organisations and suggest to reinforce the role of

power of downstream partners in respect of certain contractual parameters. The degree of detail laid down in such collective framework contracts can vary from defining which details the individual contracts must address[88], to covering certain substantive elements in the framework itself, e.g. price ranges, price formulae or value sharing mechanisms.[89]

8.2. Issue

120. In the agricultural policy debate 'contractualisation' is often used to connote a longer-term commercial relationship or framework – contractually covering recurring physical transactions, deliveries and payments – rather than transactions on a spot market. As such, it implies advantages for farmers thanks to secure market outlets against the backdrop of uncertain future market developments.

121. In general, contract law is under the legislative power of Member States and therefore national rules and practices in the field differ. Having said that, specific provisions have existed for certain sectors in the CMO for many years and have their motivation in the differences in bargaining power between farmers and their downstream trading partners (see box in paragraph 94).[90] The 2013 reform of the CAP extended the specific provision on the possibility of written contracts that exist in the milk sector - to be decided by Member States - as an option to the other agricultural sectors. Member States have the possibility to make written contracts compulsory for the delivery on their territories of products of agricultural sectors.[91] If contracts are made mandatory, certain minimum criteria have to be agreed as part of the contract (such as price, quantity/quality of product, payment modalities, duration and delivery). To date, only a few Member States have availed themselves of this possibility.[92] Some consider it preferable to leave it to the industry whether to use contracts.[93]

122. As regards collectively negotiated contracts, there are constraints deriving from competition law that have to be kept in mind and that affect the scope of contractualisation.[94]

8.3. Assessment

123. Contracts, especially of the long-term and forward kind, can help farmers manage their cash flow and risk, afford them planning security and facilitate investments.

124. But contractualisation should not be perceived as a tool beneficial only to agricultural producers; it can provide benefits for their contract partners and consumers by enhancing

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Associations of Producer Organisations to have an effective counterweight in negotiations with downstream partners.

[88] See Article 168 CMO

[89] See for instance the possibility of such value sharing in `agreements within trade` in the sugar sector (Commission Delegated Regulation (EU) 2016/1166 of 17 May 2016). In the US some wine grape prices are tied to finished bottle prices.

[90] There were rules for sugar delivery contracts, hops and milk.

[91] Article 168 CMO does not cover milk and sugar products. It also enables Member States to require that the offer of the first purchaser has to be in writing.

[92] A Commission's survey on the use of Article 168 CMO which enables Member States to require written contracts revealed that of the 24 Member States which replied to the Commission's request, only 5 (France, Italy, Lithuania, Spain, Poland) have introduced mandatory written contracts. The use of contracts in the milk sector according to Article 148 CMO is higher, 13 Member States currently provide for compulsory contracts: France, Italy, Spain, Lithuania, Hungary, Slovakia, Croatia, Cyprus, Portugal, Bulgaria, Romania, Slovenia and Poland.

[93] UK Defra (Department for Environment, Food & Rural Affairs), June 2016, 3rd party contribution to the TF, point 2, findings from a survey among industry bodies.

[94] C. Del Cont, 24 May 2016, presentation to the TF, slides 2, 14-16

communication and transmission of market signals along the supply chain.[95] It would seem that at times the operators in the chain have paid too little attention to their interdependence.

125. Dedicated supply chains - e.g. in the areas of marketing products, or developing joint standards for animal welfare or other types of quality - can present a sustainable way of building trust, meeting consumer demand and creating added value, not least for producers.[96] Longer term tripartite contracts between farmers, processors and retail provide farmers with a reasonable income and allows retailers to market products according to quality specifications and to offer traceability assurance and transparent product information to the consumer (see the box below).[97]

Initiative Tierwohl - Initiative Tierwohl is a German initiative by primary producers, the meat industry and retailers in the pig, beef and poultry sectors to ensure a more animal-friendly production. The farmer adheres to certain obligatory standards (e.g. in terms of space, hygiene, feed, water provision, and health and quality checks) and chooses from a set of additional voluntary standards. For his efforts he receives a basic contribution as well as additional contributions depending on the chosen standards. The payments are funded by fees paid by the participating retail members of the initiative. The initiative is widely marketed, and advertised to consumers in retail outlets. The initiative had been widely discussed with relevant stakeholders, including competition authorities - which did not raise objections.

Carrefour beef scheme - In September 2016, the French retail group Carrefour concluded an agreement with beef producers who had suffered income losses resulting from oversupply. Carrefour commits itself to calculating the meat price in relation to production costs, which is a novelty. The parties agreed to review the production costs every three months, Carrefour also made the commitment that 50% of the stock on its shelves would be made up of quality beef from animals especially raised for meat production (rather than from dairy cows).[98]

126. There are also recent examples of contracts by cooperatives which guarantee prices for suppliers and take into account their production costs (see box below).[99]

[95] E. Valverde, 24 May 2016, presentation to the TF, p.7 et seq. See also EuroCommerce, 23 May 2016, 3rd party contribution to the TF

[96] L.O. Fresco and K.J. Poppe, September 2016, *Towards a Common Agricultural and Food Policy*, pages 24, 35 and 44

[97] NFU (UK National Farmers Union), 16 August 2016, 3rd party contribution to the TF, page 4, refers to sustainable supply chain structures operated by retailers together with farmers and based on farmers costs. Other retailers work through their dairies but also base themselves on farmers´ costs.

[98] http://www.lemonde.fr/economie-francaise/article/2016/09/07/viande-bovine-les-eleveurs-et-carrefour-parviennent-a-un-accord_4994192_1656968.html. Another tri-partite contractualisation for the pork sector exists in France for the brand Le Porcilin, which concerns a cooperation between producers and supermarkets such as Auchan Arras. The purchase price also takes into account the production cost of the producers. The feed of the animals are supposed to meet certain standards which should increase meat quality.

[99] Y. Tregaro (FranceAgriMer), 24 May 2016, presentation to the TF, slide 2

Glanbia Fixed Milk Price Schemes - Irish milk processor and ingredient supplier Glanbia recently adopted a new Fixed Milk Price Scheme, which follows a number of earlier anti-volatility schemes. The scheme is open to milk suppliers that have signed a Milk Supply Agreement. The voluntary scheme locks in a certain minimum milk base price based on a given quantity. Volumes will be decided depending on the number of applications for the scheme.

As a novelty, suppliers also have the option to protect their margin by fixing the price for a defined volume of feed.

Glanbia Milk Flex Fund - In cooperation with the Ireland Strategic Investment Fund, Rabobank and Finance Ireland, Glanbia Co-operative Society created a new Euro 100 million Fund which offers flexible and competitively priced loans to Glanbia milk suppliers.

An innovative feature is the Fund's flexibility to adjust repayment terms for the loans in line with the manufacturing milk price. This means that temporary reductions in repayments or even a moratorium will apply if the milk price falls below a certain threshold.[100] The European Investment Bank (EIB) has taken an interest in this approach (see chapter 10).

127. In particular for price negotiations, producer organisations or their associations may be able to broker mechanisms for increased price stability by negotiating with their partners. This can be done by agreeing on different pricing categories (such as the A, B and C prices for milk)[101] or value sharing mechanisms which determine some contractual parameters which then are integrated into the individual contracts. The latter possibility exists in the sugar sector.[102]

128. Apart from joint sales negotiations, producer organisations can further play a role by helping producers acquire the necessary knowledge to deal with complex agricultural contracts, e.g. contract farming or tri-partite contracts which involve production according to pre-defined criteria.

129. Written contracts, in particular long-term and forward contracts, while no panacea, can provide a measure of assurance for farmers and can be one element in an effective risk management strategy. There is currently no legal obligation at EU level to use *written* contracts. Nor was a general obligation deemed desirable in the 2013 reform despite the possible positive benefits.[103] Some Member States do require written contracts in certain situations, partly

100 https://www.glanbiaingredientsireland.com/news/glanbia-launches-%E2%82%AC100m-milkflex-loans-scheme

101 A. Trouvé et al., June 2016, *Etude sur les mesures contre les déséquilibres de marché* http://agriculture.gouv.fr/etude-sur-les-mesures-contre-les-desequilibres-de-marche-quelles-perspectives-pour-lapres-quotas, page 12.

102 See CEFS (Comité Européen des Fabricants de Sucre), 19 September 2016, 3rd party contribution to the TF, *Good practices in the EU sugar sector*, page 2. Recital 3 of Delegated Regulation (EU) No 2016/1166 reads: "*The value sharing clause in point XI of Annex XI to Regulation (EU) No 1308/2013 currently enables beet growers and sugar undertakings to secure their supplies on pre-defined purchase terms with certainty on the sharing of profits and costs involved in the supply chain to the benefit of the beet growers, thereby strengthening their bargaining power. The benefit of value sharing also transmits the price signals in the market directly to the growers, thereby also providing them with a closer link to the real market price in so far as the negotiated base price does not in itself fully reflect the market price*".

103 See CGAAER (Conseil Général de l'Alimentation de l'Agriculture et des Espaces Ruraux), December 2015, *Mise en œuvre de la contractualisation dans la filière laitière française*, http://agriculture.gouv.fr/sites/minagri/files/cgaaer_15053_2015_rapport-2.pdf, page 23. See also Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, page 3.

because they consider these an important means of tackling UTPs.[104]

130. We are of the opinion that EU legislation should make a written contract mandatory if the agricultural producer – the weaker party in the transaction - requests a contract with his customer in the processing or retail industry and this customer is not an SME. The specific situation in respect of cooperatives (where the agricultural producer is a member of the cooperative) will have to be kept in mind.

131. Furthermore, the development and dissemination of standard contract terms, adaptable to the needs of the contract parties, allows operators in the supply chain to base themselves on a commercial yardstick which, ideally, is the outcome of a process where no individual commercial interests are at stake. As farmers generally lack bargaining power in their individual business relationships such standard contracts can, on balance, be beneficial for them. Currently, some interbranch organisations engage in such work, but not as a priority and they are sometimes unsure about what can be legitimately included in such standard contracts.

8.4. Recommendations

132. Agricultural policy should facilitate the understanding of the interdependence of operators along the food supply chain. Consumers are ultimately ill served if farmers are squeezed and primary production made fragile in a low-cost race. Contractualisation can, to a degree, play a useful role in structuring the relationship in the chain in a mutually beneficial way. However, one needs to acknowledge its limitations. It will not be able to fully redress the asymmetric bargaining power of operators in the food supply chain.[105]

133. In light of the above considerations we recommend the Commission take the following action:

a. Subject to the particular features of cooperatives, make written contracts mandatory if the agricultural producer requests this from his customer/contract partner and this partner is not an SME. This would not affect the existing possibility for Member States to make contracts mandatory for all sectors.

b. Identify, share and promote best practices concerning contractualisation in the supply chain, in particular those related to dedicated supply chains and tripartite arrangements.[106] Encourage interested parties to come forward with such examples. Existing fora such as the voluntary Supply Chain Initiative or the High-Level Forum on the Better Functioning of the Food Supply Chain could become platforms for this process.

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[104] Under Spanish law, food procurement contracts have to be in writing if they exceed a value of EUR 2500 and if one of the parties finds itself in a situation of imbalance (one party being a SME and the other not, one of the partners being a primary agricultural, livestock, fishery or forestry producer, or a group having such status, and the other is not, or one of the operators economically depends on the other), https://www.boe.es/boe/dias/2013/08/03/pdfs/BOE-A-2013-8554.pdf , preamble III.

[105] See CGAAER (Conseil Général de l'Alimentation de l'Agriculture et des Espaces Ruraux), December 2016, *Mise en oeuvre de la contractualisation dans la filière laitière française*. See also C. Del Cont, 24 May 2016, presentation to the TF, slide 11.

[106] See for example Coop de France, *Coopératives de Nutrition Animale et marchés agricoles: s'organiser pour sécuriser*, http://www.coopdefrance.coop/fr/post/1719/coop%C3%A9ratives-de-nutrition-animale-et-march%C3%A9s-agricoles-s-organiser-pour-s%C3%A9curiser.html

c. Promote the development of standard contract clauses that can be used in individual contracts entered into between farmers, their organisations and their buyers and promoted in the sectors concerned.[107] Interbranch and producer organisations can be instrumental in developing such models for the various supply chains.

d. Explore the feasibility and effectiveness of (mandatory) ex ante value sharing mechanisms through collective negotiations between actors, especially in sectors where the division of the added value in the food chain is lopsided. The objective would be to make it possible to re-establish a firmer and fairer link between producer prices and the added value accruing in the chain.

9. THE CAP AND COMPETITION LAW

9.1. Introduction

134. Farmers may use collective action and horizontal cooperation to achieve common interests related to their agricultural business. Collective action can cover all of the (commercially) relevant activities of farmers from the planning of production to the placing of products on the market. Incentives to act collectively relate to commercial or other benefits[108] (e.g. concerning landscapes, sustainability, climate change, animal welfare) that are achieved less efficiently – or not at all - by acting alone.

135. Typically, farmers act collectively in an institutionalised form such as in a cooperative or a producer organisation (PO). Collective measures can also involve downstream operators such as processors and retailers through vertical cooperation. Interbranch organisations (IBOs) or multi-partite contractual arrangements in the supply chain may provide relevant platforms for vertical cooperation between producers, processors and retailers.[109]

9.2. Issue

136. Since its inception one of the key objectives of the CAP has been to countervail the fragmentation of agricultural producers. Agricultural production is in general highly fragmented and is largely comprised of small scale enterprises.[110] In contrast, it has been estimated that the majority of the European food is bought by retail through about 110 buying desks, whereas perhaps about 3 million farmers produce three quarters of our food (2012 data).[111]

137. The CAP actively promotes organisation among farmers and collective action - through POs and associations of POs (APOs). The Common Market Organisation regulation's preamble states:[112]

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[107] See the example of cereals, GAFTA, http://www.gafta.com/Contracts-2014%E2%80%8E. See also Incograin (syndicat de Paris), www.incograin.org.

[108] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 118

[109] See for example CNIV (Comité National des Interprofessions de Vins à Appellation d'Origine et à Indication Géographique), 7 April 2016, 3rd party contribution to the TF

[110] European Competition Network (ECN), *Report on ECN activities in the food sector*, May 2012, paragraph 21 of introduction

[111] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 116

[112] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products

"Producer organisations and their associations can play useful roles in concentrating supply, in improving the marketing, planning and adjusting of production to demand, optimising production costs and stabilising producer prices, carrying out research, promoting best practices and providing technical assistance, managing by-products and risk management tools available to their members, thereby contributing to strengthening the position of producers in the food chain."[113]

138. The EU legislator has established a framework for POs by setting out rules on the recognition of POs in Member States and by making financial support available for setting up POs – through the rural development policy pillar of the CAP. It also provides for certain legal privileges including derogations from competition law.

139. As per the CMO, strengthening farmers' bargaining power and ensuring a fair and competitive marketplace for agricultural goods are important objectives of producer cooperation.[114] POs and cooperatives allow farmers to create and appropriate a higher share of the added value of the products sold through the supply chain and to get better access to agricultural inputs. This also has positive effects on producers who are not organised (competitive yardstick theory).[115] Producer groupings can be agents of innovation in the supply chain, thereby contributing to its smooth functioning and adequate responsiveness to consumer demand and societal preferences. They can increase their sectors' competitiveness and sustainability and ensure long-term investment and innovation thanks to improved security in market outlets.[116]

140. Having said this, cooperation by competitors in any given commercial sector raises the general question of compatibility with competition rules under EU and national law. Agreements between competitors which restrict competition are in general prohibited so as to safeguard effective competition (Article 101(1) TFEU);[117] only efficiencies generated and passed on to the consumers of the product can exceptionally make such agreements acceptable (Article 101(3) TFEU).[118]

141. Between them, agricultural law and competition law do not present a clear picture of what agricultural producers are allowed to collectively do.[119]

9.3. Assessment

142. The objectives of the CAP as laid down in Article 39 Treaty on the Functioning of the

[113] *Idem*, recital 131

[114] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, pages 13, 72. See also K. Van Herck, June 2014, *Assessing efficiencies generated by agricultural Producer Organisations*, page 4, paragraph 4

[115] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, pages 13, 76

[116] See for instance Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, page 11. As to positive externalities created by cooperation at IBO level, which take into account consumer demand and societal preferences, see O. Thelen, 28 June 2016, presentation to the TF concerning 'Initiative Tierwohl' in Germany

[117] It also covers agreements which have as their object the restriction of competition and which by their very nature have the potential of restricting competition. Cartels are examples of such illegal agreements.

[118] See DG COMP, 23 November 2009, *Synopsis of Member States´ national competition authorities contributions on the milk supply chain*, page 19

[119] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 10

European Union (TFEU) includes references to the welfare of both consumers (in terms of reasonable prices for foodstuffs) and producers (in terms of a fair standard of living). Furthermore it makes reference to stabilising markets. This unique 'constitutional' characteristic of the EU's agricultural legislative competence cannot be found in other sectors. It allows the preliminary conclusion that the exclusive focus on consumers that is customary under classical competition law pursuant to Article 101(3) TFEU cannot be the only yardstick for the assessment of cooperation among producers in the agricultural sector.[120] The existing agricultural derogations from competition law have to be seen in this systemic context. Accordingly, while the European Court of Justice (ECJ) has held that the maintenance of effective competition in the market for agricultural products is one of the objectives of the CAP[121], it has, in a previous judgement, emphasised the primacy of the objectives of the CAP over those of competition policy.[122]

143. The Treaty on the Functioning of the European Union confers on the EU legislator (the Council and the European Parliament) the power to determine the extent to which competition rules apply to the production of and trade in agricultural products, taking into account the objectives of the CAP (Article 42). The legislator has determined that extent in the CMO - pursuant to which competition rules apply unless otherwise stated in the regulation (Article 206 CMO).

144. We are surprised that EU law does not feature a general and explicit derogation from the prohibition on cartels enshrined in Article 101(1) TFEU in favour of agricultural cooperatives or producer organisations. In contrast, the US legal order has contained such a general derogation for cooperatives' joint selling since 1922 (*Capper Volstead Act*).[123] German law, for example, also enshrines an exception from competition law for cooperation of producers in agricultural cooperatives and POs (*Erzeugerprivileg*).[124]

145. The current agricultural derogations as laid down in the CMO regulation are the result of a historically grown patchwork of *ad hoc* approaches and solutions, sometimes the result of institutional compromise, which lack a common organising principle. This is a far cry from the coherent and integrated policy framework that is desirable.[125] The piecemeal approach may have abetted a tendency on the part of competition authorities to 'move the borders' concerning the

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[120] See also the European Parliament, *Resolution of 7 June 2016 on unfair trading practices in the food supply chain*, (2015/2065(INI)), recital 28: "*[The EP c]onsiders it essential to ensure that EU competition law takes into account the specific features of agriculture and serves the welfare of producers as well as consumers […]*".

[121] ECJ, Case C-137/00, *Milk Marque*, judgment of 9 September 2003, paragraph 57. The Court has considered that the EU legislator has managed to reconcile the CAP objectives with competition policy through the system of principles and exceptions.

[122] ECJ, Case C-280/93, *Germany v. Council of the European* Union, judgment of 5 October 1994, paragraph 61

[123] See for instance I. Grouws and T. Lamprecht, May 2012, *Competition law and agricultural co-operatives: can international developments show the way forward for South Africa?*, page 9 et seq.

[124] This covers joint commercialisation without further integration of activities. See German Bundeskartellamt, January 2012, *Abschlussbericht Sektoruntersuchung Milch*, pages 75 et seq., in particular paragraph 223. The relevant provisions are Article 28 *Gesetz gegen Wettbewerbsbeschränkungen* (cooperatives) and Article 11 *Marktstrukturgesetz* (POs). See also Handelsverband Deutschland, June 2016, 3rd party contribution to the TF, page 3 and DG COMP, 23 November 2009, *Synopsis of Member States´ national competition authorities contributions on the milk supply chain*, page 9

[125] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 100

particular treatment which EU primary law had intended for the agricultural sector.[126]

146. As a further illustration, while agricultural legislation lists the concentration of supply and the planning of production as key activities for POs, certain competition authorities consider production planning agreements or joint selling by a cooperative or a PO as in principle prohibited and in need of an individual exemption.[127] In contrast, an ECJ judgement confirmed that *insufficient* joint selling by a PO makes this PO ineligible for EU support (see Annex B, paragraph 30). This tension also underlies a recent case in France (*cas endives*), in which a decision by the national competition authority has been annulled by the Appellate Court which suggested the possibility of a completely different reading of the agricultural derogations for POs under EU law. The case has been referred by the French *Cour de Cassation* to the ECJ for a preliminary ruling.[128]

147. In short, questions about the precise scope of the possibilities and constraints applying to producer cooperation abound. Ambiguity of rules also risks giving rise to diverging approaches by national competition authorities thereby undermining the internal market. We set out the current legal framework in more detail in Annex B and highlight some of the fundamental legal ambiguities that arise concerning its application.

148. Conflicting rules translate into legal and commercial uncertainty for producers and downstream stakeholders alike. Conflicting rules have a chilling effect on business.[129] Stakeholders are not only confronted with rules that are ambiguous but also with the absence of any procedure which would afford them legal clarity up-front[130], as the principle of self-assessment devolves the responsibility of legal assessment to the stakeholders. The risk of incurring a fine is one that farmers cannot afford. By the same token, neither farmers nor their POs can normally afford specialised legal advice so as to navigate the applicable rules (such as for example the question of what is the relevant market[131]). Lack of clarity concerning the applicable rules is thus liable to have a disturbing effect on the self-organisation of farmers and risks ultimately undermining the efficiency of the whole supply chain.[132]

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[126] See P. Chauve et al., 2014, *Agriculture, Food and Competition Law: Moving the borders*, Journal of European Competition Law & Practice, 2014, page 310: "In practice this means that, when farmers wish to negotiate contract terms collectively via POs to gain bargaining power, they are obliged to integrate other activities in order to respond to market challenges in a pro-competitive manner. This is a paradigm shift in the discussions of the agricultural world about competition rules. A concept of efficiency has been introduced as a requirement for allowing horizontal agreements between farmers."

[127] See DG COMP's submission to the TF, June 2016, pages 5-6

[128] ECJ, Case C-671/15, *APVE*, pending

[129] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, pages 10, 118

[130] See e.g. Government of Flanders (Belgium), 4 July 2016, 3rd party contribution to the TF, page 1: "[*the relevant rules] are absolutely not clear, transparent or understandable for farmers […]*".

[131] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 105, footnote 33. See also Copa Cogeca, 5 July 2016, 3rd party contribution to the TF, Annex - *Copa Cogeca proposals for strengthening the role of economic organisations in the agricultural sector within the discussion on the future of the CAP post 2013*, page 8

[132] See also University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, 2012, page 108, on the importance of different policies with regard to the success of cooperative development. Competition rules are among the policies reported most often.

149. The reduced level of market management brought about through recent and ongoing CAP reforms has significantly reduced the CAP´s price supporting effects. EU prices are now usually aligned with world market prices. The proportion of the average EU household´s budget spent on food has fallen to 13% as compared to 30% at the beginning of the 1980s.

150. The fact that there is less public market management further adds to the importance of a clear definition of the governance role the actors in the supply chain are expected to play.

151. Having heard about and having discussed the relevant rules and exceptions with experts in the meetings of the task force, we conclude that there is significant potential to render the agricultural derogations from competition rules clearer, more coherent and workable.

152. A few basic considerations can guide us in the formulation of how these rules should look. First, agricultural derogations are to be informed by the CAP objectives as set out in Article 39 TFEU. These include a fair standard of living for producers. Producer organisation has positive effects on the prices farmers are able to obtain.[133] Consequently, so as to promote the creation and use of producer organisations as a vehicle to achieve the CAP objectives, the legal privilege which the legislator has established for POs should be put in clear and plain language: by way of explicit derogation from competition law, recognised POs should be able to jointly plan production and jointly sell the products of their members. These are core activities of POs and they should not be subject to any farther-reaching conditions except as follows: a safeguard should apply inasmuch as a PO's joint planning or selling must (i) not jeopardise CAP objectives nor (ii) eliminate competition.[134] For example, a PO's joint selling must not lead to unreasonable consumer prices. Many POs account for a limited percentage of the production of a given product within an appropriately-defined geographic area and they are therefore not likely to have any ability to influence prices or terms of competition in such a manner. The current tension that exists between Article 152 CMO and Articles 169-171 CMO should be resolved.

153. Second, Article 209 CMO which has been introduced by the legislator to constitute a general derogation for agricultural producers regardless of their form of organisation should finally be given meaning and not remain a dead letter. Collective action by agricultural producers under the second derogation of Article 209 CMO should be defined via guidelines. Additionally, the possibility for farmers should be created to obtain legal clarity from the Commission about Article 209's applicability without needing to risk fines under a 'self-assessment only' approach. The concepts of jeopardising CAP objectives and of elimination of competition – both suggesting a considerably higher threshold than the ECJ has postulated for the first derogation of Article 209[135] - should be clarified.

154. Third, the existing specific derogations from competition law in the milk or sugar sector[136] should continue to apply as we assume they remain justified by the particular features of the sectors concerned. The second report on the

[133] University Wageningen, November 2012, *Support for Farmers' Cooperatives*, report to European Commission, page 116

[134] The ECJ has held that no single CAP objective may be pursued in isolation in such a way as to make the achievement of the others impossible. See Case C-137/00, *Milk Marque*, Judgement of 9 September 2003, paragraph 91.

[135] See e.g. ECJ, Case T-217/03 and T-245/03, *FNCBV*, judgement of 13 December 2006, paragraph 199. The ECJ has argued that for the first derogation of Article 209 CMO to apply the agreement concerned should be conducive to the attainment of *all* CAP objectives.

[136] Articles 149 and 125 CMO

milk package that is planned for the end of this year will allow an evaluation of the effects of the fresh-milk derogation.

9.4. Recommendations

155. The European Commission should take the initiative to end the confusion that currently reigns over the limits of producer cooperation in the agricultural sector. Such clarification ought to dispel the ambiguities and favour clear and workable rules over overly wrought nuances which are mainly of academic consequence. Doing so, it must be cognisant of the primacy of CAP objectives over those of competition policy as stipulated by the ECJ.

156. The cleanest approach to doing so would be to revise and clarify the agricultural exceptions in the CMO regulation. This will be legally binding on all parties involved (farmers, downstream operators, the European Commission, national competition authorities, judicial authorities). Guidelines would seem second-best but could have a positive effect in areas such as Article 209 CMO.

157. In light of the above we recommend that the Commission take action so as to achieve the following results:

a. Make recognised POs and APOs, that is to say POs which integrate activities of their producer members aimed at improving production performance (e.g. in terms of sustainability, animal welfare, workers' conditions), benefit from a derogation from the of EU competition law´s prohibition on cartels.[137] In other words, such a PO/APO should be able to jointly sell and jointly plan production. CAP objectives must not be jeopardised nor competition eliminated. Such derogation is not to cover agreements *between* POs or APOs.

b. Keep in place the sector specific derogation applying to the joint selling of fresh milk (Article 149 CMO) up to the existing thresholds in view of the specific situation of the European milk market and - depending on the findings of the 'milk package' report of 2016 - extend it to other agricultural sectors.

c. Subject to point (b) above and to the sugar regime provisions, eliminate the existing sector-specific derogations so as to render the above derogations horizontally applicable and easy to use for farmers.

d. Retain the 'crisis cartel' provision in the CMO regulation (Article 222) as it allows temporary collective action between POs and also vertically. Extend it to cover independent producers which are not members of a PO, and to producers in cooperatives. Discontinue its current status as a measure of last resort.

e. Redraft Article 209 CMO – applying to all farmers not just POs – so as:

   i. to specify the derogation in such a way as to make it workable and applicable.

   ii. to provide for a procedure to obtain a 'comfort letter' from the Commission (see the procedure laid down in Article 210 CMO) thus enabling farmers to obtain legal security

[137] This is also in line with the finding that larger POs are more efficient. See K. Van Herck, June 2014, *Assessing efficiencies generated by agricultural Producer Organisations*, page 6, paragraph 18. The prohibition of abuse of dominance applies to such entities if they are dominant. The 2013 CAP reform has clarified this. *Idem*, page 8, paragraph 30.

upfront (while operators will be able to benefit from Article 209 CMO even if they do not avail themselves of the notification possibility).

10. ACCESS TO FINANCE

10.1. Introduction

158. The availability of financing for the agricultural sector can be facilitated by EU policy measures, in particular by increased support for financial instruments. Here, the term 'financial instruments' (FIs) denotes financial measures co-funded under the EU budget. Such measures may take the form of equity investments, loans, guarantees or other risk-sharing instruments and address one or more specific policy objectives of the EU.[138]

159. The rules defining the functioning of EU-level FIs are defined in the Financial Regulation[139], while those related to the European Structural and Investment Funds are defined in the Common Provisions Regulation[140]. Further (eligibility) rules may be specified in the fund-specific regulations such as EAFRD.

160. FIs exist alongside grants or repayable assistance to name just two other forms of support. They may support financially viable investments, that is to say projects which generate enough income or savings to pay back the support received. In 2014-2020 their scope of application has been significantly widened to cover all types of investments (including infrastructure), targeting a wide range of beneficiaries.

161. In the EU, FIs can be implemented either at EU-level or under shared management. The European Structural and Investment Funds are implemented under shared management by Member States through their managing authorities.

162. The European Investment Bank (EIB) and the European Investment Fund have become in recent years the most prominent managers of EU funding channelled to the economy through FIs (see the recent creation of the European Fund for Strategic Investments (EFSI)).

163. FIs' main objective is to stimulate the access to finance for recipients who have difficulties in finding funding for their investments. In other words, FIs address an identified market failure where banks do not lend and/or where the private sector is reluctant to invest or where demanding conditions are being requested (e.g. lending possible but against very high collateral, abnormally high interest rates offered to potential final recipients).

164. FIs are 'revolving' - which means that once repaid they can be used again. Normally, they are designed to attract co-investment from other sources, including private investment, and therefore to increase the amount of overall funding available.

10.2. Issue

165. Agriculture continues to be considered risky in the world of financing. This is due to agricultural particular features and a lack of knowledge about them in standard financial institutions: the often small scale of operations, the existence of specialised types of assets, the high average age of farmers (with older farmers less likely to receive credits) or a lack of credit history, as well as inadequate accounting practices: all these constitute "entry barriers" for non-specialised banks or institutional lenders. Generally speaking, strengthened global

[138] Definition provided in Article 2 of the EU Financing Regulation, applicable to all FIs in the EU.

[139] Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013

[140] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013

minimum capital requirements under the 'Basel-framework' have made banks more risk inhibited.[141]

166. This makes it difficult for the sector to access finance and to ensure the necessary level of investment that makes it possible to maintain or achieve competitiveness. The most affected strata of farmers are young farmers[142], small farms and producer groups, notably in the dairy and pig-meat sectors.

167. As regards FIs in particular, the demand for them - co-funded by the EAFRD - had slightly increased after 2007, although unevenly across the EU. But in spite of EU efforts to promote FIs (see Annex C), the financial and economic crisis has reduced available budgets for rural areas and agriculture in general in many EU countries and has also affected the uptake of FIs.

168. The problems are still present in the current 2014-2020 period as the economy is recovering while budgets are still constrained. In large parts of the EU, specific FIs for agriculture do not exist. EU-level general FIs partially compensate for that, but their design is not specifically focused on agricultural needs.

169. Beyond the more general budgetary constraints, designing and deploying FIs presents challenges for Member States (see Annex D for a short discussion). The platform fi-compass was created in 2014 to provide technical assistance to Member States in this regard.

170. The European Investment Fund, which is part of the EIB Group, is at present managing only one EAFRD financial instruments (in Languedoc-Roussillon). It is involved in a few other cases in the preparation of FIs by Member States' managing authorities. There is considerably more activity of the EIB Group in the area of Structural and Cohesion Policy than in the EAFRD. The Investment Plan for Europe and in particular EFSI are being focused on certain sectors and Member States (such as wood pulp in Finland); the current set-up tends to marginalise less competitive and profitable undertakings. The possibility should be further explored to blend CAP funds with EFSI resources in order to attract private sector funding, especially to stimulate SMEs' investments into research and development concerning new technologies.

10.3. Assessment

171. European agricultural holdings are subject to an ongoing process of structural adjustment. Farmers have been reacting to new market requirements and demands, as well as to new production practices, societal expectations and environmental concerns. Some have abandoned production.

172. Structural adjustment of a holding often presupposes effective access to finance so as to undertake investments in capital goods. FIs including guarantees can be a viable way to overcome inadequate financing options. Guarantees, unlike loans, may allow banks or intermediaries to support investments or transactions without negatively affecting banks´ minimum capital requirements. Furthermore, export credit guarantees, for example, can facilitate exports by covering the risk of non-payment and could be operated by the EIB on a revolving fund basis, in particular where letters of credit would otherwise be difficult to obtain.

[141] See for example DACF (Danish Agriculture & Food Council), 16 May 2016, 3rd party contribution to the TF, page 1

[142] In 2014, the Council called for the creation and use of FIs supporting young farmers in Europe. In this context, access to funds for the purchase of land remains a sensitive investment issue, impeding young farmers' access to the agricultural business.

173. FIs can be a sustainable way of investing EU resources in growth and development of agricultural businesses and the wider rural economy on a revolving basis. A combination of existing sources of funding can attract private sector funding in turn; this approach has potential to boost investments in agricultural sectors that are in need of restructuring.

174. In the light of what we have heard during our investigation we consider that the involvement of the EIB Group should be stepped up and become bolder than has been the case so far. The presentation of the EIB to the TF showed the potential of FIs such as Glanbia's scheme in Ireland which leverage public funds as a guarantee to attract funding from private investors.

175. Innovation and technological change have to be stimulated and climate change impacts have to be addressed. Therefore, FIs created in particular for the green economy and the bio-economy, renewable energy, the circular economy and agri-food advanced technologies may have a prominent role to play.

10.4. Recommendations

176. We share the interest of the Commission in stimulating the set-up and implementation of FIs with support from CAP money. The legal and policy proposals made so far to simplify the implementation of FIs strike us as necessary, as do the encouragement of Member States to intellectually and practically invest in FIs as an efficient way of making CAP money work for the sector.

177. We also welcome the efforts from DG AGRI and the EIB Group to jointly enhance access to funding, to stimulate capacity building in managing authorities and to stimulate the global financial envelopes made available to EU farmers and processors through normal EIB lending to banks.

178. On this basis, we recommend the Commission to take the following action:

a. Encourage the EIB Group to step up its efforts in the area of financial instruments for the agricultural sector facilitated by CAP money. More pilots should be rolled out and a strategic approach taken that effectively makes the EIB Group a player in the market beneficial to EU agricultural sectors as well as to EAFRD financial instruments targeting agriculture and the agri-food sector.

b. In particular, encourage the EIB Group to make available guarantees to local banks so as to facilitate their giving loans to farmers.

c. Encourage Member States to establish the necessary links and relationships with the EIB and to benefit from its experience given that the EAFRD is implemented under shared management.

d. Further improve the design and targeting of financial instruments so that financial instruments become a viable part of the toolbox of the future CAP (e.g. financial instruments designed to reflect and manage price volatility or financial instruments designed for young farmers who intend to purchase productive land).

e. Explore the development of specific Commission-administered financial instruments which could make it possible to alleviate the administrative burden on Member States.

f. Explore the setting-up of an export credit guarantee facility at the EIB Group for agricultural exports from the EU, so as to reduce risks in new markets.

PART III – CONSIDERATIONS ON THE CAP POST 2020

Fairness is justice that goes beyond the written law.

Aristotle, *Rhetoric*

1. INTRODUCTION

179. As announced at the start of this report, independently of our specific recommendations concerning the food supply chain we should like to share some general considerations concerning the CAP.

180. First, we consider it appropriate to briefly look at the CAP in retrospect and see it in its historical context.

181. This examination of the past will allow us, secondly, to address the fundamental question of whether there are good reasons and sound arguments for retaining a CAP after 2020. And thirdly, if there are such reasons, what kind of recommendations can be formulated to secure public support for a viable CAP in this new context?

2. THE CAP IN RETROSPECT

182. In 1962 the (CAP) was instituted as a means of ensuring food security in Europe. This objective strikes us as still every bit as important and valid as it was back then. Food security is a strategic asset, like defence capability and energy supply. This gives the EU's farm sector critical importance: in an unstable world, Europe should attempt to avoid too great a dependence on other countries for the provision of its food. It is possible to imagine scenarios in which food security could play a greater role than we would dream of.

183. The importance of agriculture for society extends beyond its role as a source of life-enabling food. The EU agri-food sector (agricultural producers and the food processing industry) employs 6.3% of the European labour force and accounts for 3.8% of GVA (2013 numbers). EU agriculture shapes the landscape of almost half of the EU´s territory. Apart from the 22 million persons active in farming, there are more than 4 million jobs in food processing and more than 17 million in food services and retail (adding up to a grand total of around 44 million).

184. Through its successive reforms and common financing, the CAP has been able to address the challenges in respect of very diverse agricultural sectors and rural profiles. By and large, the CAP has retooled every 10 years to stay relevant to changing economic and societal parameters. It has throughout the years addressed the food security and production challenge (through market measures) and the revenue situation of farmers (through direct payments), has mobilised funds for structural measures that increase agriculture´s competitiveness (through rural development policy) and has also made a substantial share of subsidies subject to the preservation of the environment and the fight against climate change. The sustainability of EU farming has thus become a key component of both CAP pillars.

185. A common supporting framework for agriculture and rural development, paired with common rules for EU farmers, has made it possible to address the diversity that exists in the EU in terms of territorial needs and citizens' preferences. Consistent with this rationale, today's CAP sets itself three main objectives: (i) viable food production, (ii) sustainable management of natural resources and climate action, and (iii) balanced territorial development.

186. The way the CAP has gone about assisting viable food production since the early 1990s has been increased market orientation.

Intervention prices have been lowered and a safety net has been established for severe market imbalances. Export refunds are no longer used. Supply restrictions, such as dairy quotas and sugar quotas, have been or will be phased out - which allows competitive producers to seize market opportunities. Due to market orientation, European farmers have been able to play to some of their key strengths: a favourable climate overall, a resilient and competitive primary sector, a highly innovative agri-food industry building on the excellent reputation of European food products in terms of quality and safety, and a skilled labour force. Today, in many sectors EU prices converge with world market prices. In fact, the EU has been a net food exporter since 2010, thanks in part to the pursuit of its offensive export interests in multilateral and bilateral trade negotiations.

187. The CAP has ensured food security in Europe together with farmers' resourcefulness, resilience and ability to compete in the market. It is not only cereals that are a success but also the wine, fruit and vegetables, dairy, sugar and rice sectors and certain segments of the meat sector (beef, pig-meat and poultry).

3. REASONS FOR A BROADER COMMON FOOD AND AGRICULTURAL POLICY

3.1. Level of prices and volatility of prices

188. The overall economic context of greater integration in the world economy implies greater downside risks of (imported) market instability and increased price volatility. European agriculture has in recent years been characterised by a strong undercurrent of structural change. Market-oriented farms have become larger and very often more specialised.

189. The CAP should not prevent structural change, but it has to address the economic and social consequences. There are farmers who may struggle to achieve adequate competitiveness. Not all farmers consider globalisation an opportunity to grow their business and reap the rewards of economies of scale on export markets. There are those who look for alternatives. The recommendations in Part II target market-oriented farmers but may be of lesser practical value for this second category of farmers. As an illustration: while futures can constitute a tool for farmers to manage the effects of price volatility they are no remedy for generally low prices.

190. The CAP, however, ought also to play a role for the second category of farmers and thus pursue the goals of balanced territorial development and viable rural areas. A modern CAP should therefore remunerate farmers who specialise in specific products and services, provided they offer measurable advantages for animals, nature and landscape which are in the public interest. A real concern in this context is avoiding overly complex and bureaucratic control regimes. The case for a fundamental simplification of current support schemes is very strong and has been made by many stakeholders.

3.2. Sustainability

191. Climate change is among the most ominous of all global governance issues. The 2015 United Nations Framework Conference on Climate Change, COP21, decided that the world should act to keep the rise in the average global temperature below two degrees Celsius, and preferably below 1.5 degrees. Globally, agriculture faces enormous adaptation challenges to cope with the productivity and production losses expected to arise from climate change. Shortages of fresh water will become common and rising sea levels directly threaten fertile river deltas which are the powerhouses of global food production.

192. On the upside, policy measures could increasingly be used to incentivise farmers to "farm carbon" in addition to crops, that is to say

to take carbon-dioxide out of the air by storing it in the soil, thereby adding to the soil's organic matter and slowing climate change.[143] Before long agriculture could become part of the solution due to its mitigation potential rather than being exclusively seen as part of the problem due to its greenhouse gas emissions.[144]

193. The demand for the provision of ecosystem services, nature conservation and other activities which contribute to the vitality of rural areas are business opportunities for farmers. Regulation, remuneration for public goods and services supplied, support measures for farming in transition between paradigms and new appropriate technologies will have to be part of the policy mix of the future and can in particular provide sources of income for regions and farmers not oriented towards world markets.

194. More specifically, the category of farms mentioned above could concentrate on regional markets and on regional or traditional products with a high 'emotional' value. Organic farming constitutes another branch of agricultural activity oriented towards specific markets with a strong potential for growth in certain regions. Public support for these kinds of activities in the form of start-up financing or support for consultancy services, dissemination of research results and communication of best practices would certainly be money well spent. The EU's rural development regime could be moved towards higher EU co-financing rates in order to stimulate such activities, especially for young farmers in regions with high unemployment. In this context, the Cork Declaration 2.0 lays out a clear and necessary roadmap to come to the rescue of rural economies and the social fabric of the countryside.

195. Agriculture in the future will increasingly be able to generate a broader range of products than food and feed. In view of future shortages of water and fossil energy, attractive possibilities for the production of fuel and fibres and also basic ingredients for pharmaceuticals and bio-based industries can be realised. Research and development activities must continue in all Member States – with appropriate stimulation, coordination and financing, including from the Commission where appropriate. Innovation in technologies and the use of big data are promising pathways. Cooperation between research institutes and universities of Member States will boost research and shorten the development and implementation time lags. It is vital that bureaucratic systems do not waste the valuable time of researchers by applying unduly stringent and protracted procedures. Much of this should be organised at Member State level.

196. The broader scope for "farming the future" of the EU also includes assuming responsibility as regards healthy food and contributing to a healthier lifestyle. That is to say, what is needed is food that is healthy in its composition but also produced in a way that society values as appropriate and ethically sound. Animal welfare, sustainability, climate neutrality and good working conditions are key elements that should be addressed. At the level of the EU, given the different stages of development and regional conditions, Member States should be given a helping hand by means of the dissemination of research results, communication of best practices and direct financing of worthwhile new initiatives at Member State level. All this could be coordinated by the Commission.

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[143] See A. Matthews, 4 April 2016, *Incentivising soil carbon sequestration*, CAP Reform Blog. The EU´s Climate and Energy Framework is work in progress but has recently opened up the possibility for credits from farming (removals of CO2) to be used in the Emission Trading Scheme.

[144] France, 25 May 2016, *A reformed CAP for competitive, sustainable and resilient agriculture*, contribution on CAP post 2020 to informal Council meeting, page 4

197. Agriculture and especially the CAP are the subject of a lot of misunderstandings in the public mind, not least due to the way it is reported about in the media. These communication errors are all the heavier with consequences as migration to the cities (*Landflucht*) not only endangers the social fabric of rural communities but also widens the gap between the citizen and the farmer, where the former is more than ever dependent on the provision of sufficient and qualitatively good food produced within reach. This applies all the more since the discussion on the environmental impact of the imports of (exotic) products over long distances and the geopolitical aspects of international free trade are increasingly called into question, as are the international agreements that pave the way for such trade.

198. It makes sense at EU level to launch and coordinate initiatives that can counteract these misunderstandings by making use of social media and other modern forms of direct communication targeted at relevant and well-selected opinion leaders. In this respect it is crucial to engage in a permanent discussion with NGOs at Member State level and even at regional and sectoral level to try to explore common ground on which new arrangements and initiatives that are in the mutual interest of stakeholders can be created.

4. THE ROLE AND CHARACTER OF DIRECT PAYMENTS

199. We discussed risk management measures in chapter 5 above. The potential of such a targeted policy and the shortcomings of the current direct payment regime, in particular its blanket nature which does not target actual needs and its effect on land and input prices, are such that we suggest exploring a resource shift to an approach which channels CAP money into a genuine and predictable safety-net for farmers to apply in times of market imbalance.

200. Today, farmers do not consider direct payments as a 'risk cover' although direct payments were originally introduced to make up for - as a *quid pro quo* - decreasing intervention prices (the latter having aimed at stabilising markets). In situations of market crises producers ask for exceptional (market) measures; the existence of direct payments is not considered a crisis response. The latest milk crisis is a case in point: two solidarity packages, together worth EUR 1 billion, have been adopted notwithstanding the existence of direct payments.

201. A resource shift should aim at introducing an integrated risk management policy at EU level that is complementary to existing Member States' strategies. We mean by this not only a loose toolbox but a structured and coherent framework of complementary private and public risk management measures. Such a framework could provide an adequate response to the variety of risks producers face. At the public level, simplified reimbursement options such as index-based loss-thresholds, adapted as need be to regional circumstances, or other technically feasible mechanisms should make it possible to steer clear of large and bureaucratic control regimes.

5. RESEARCH AND DEVELOPMENT

202. Agricultural research and innovation have a major contribution to make in addressing the increasing sustainability challenges farmers are facing. EU programmes such as Horizon 2020, the European Innovation Partnership (EIP) or the European Fund for Strategic Investments (EFSI) have to underpin and foment such approaches to innovation systems´ governance in agriculture.[145]

[145] Under the Horizon 2020 Work programmes 2014-2017, around Euro 500 million have been dedicated to multi-actor projects. Rural Development EIP programmes will support more than 3000 innovation projects to be carried out by operational groups across the EU until 2020.

203. A knowledge-based approach will further strengthen the sector's market orientation and enhance its competitiveness, as was recently recognised in the Cork Declaration 2.0. A new dynamic is clearly seen in the various types of innovation, not restricted to product and process but also encompassing organisational innovation along the supply chain, triggered by new emerging technologies and evolving consumer demand. The growing extension of information and communication technologies (ICTs) and data collection indeed offers plenty of opportunity for the agricultural sector, for example in terms of precision agriculture.[146] Broadband internet access in rural areas is a beachhead indispensable for all other ICT-related advantages. What is also needed is technical support for Member States to strengthen the capacity-building efforts so as to stimulate the uptake of new technologies and the exchange of experiences and data.

204. Advisory and extension services will play a crucial part in rolling this out. They have become too static in the recent past. What is more, capacities have been directed towards filling out subsidy and certification requests, which has resulted in a loss of technical competence and field experience. The gaps in existing farm advisory services should be closed and their role strengthened as mediators between research and practice.

205. Centres for education and training in Europe have to be revitalised and should integrate curricula focused on innovation, farm management and agricultural engineering. It is an important step towards making Europe's agriculture sector more attractive to new entrants.

[146] K. Poppe et al., April 2014, *How ICT is changing the nature of the farm: a research agenda on the economics of big data*, LEI Wageningen UR http://ifsa.boku.ac.at/cms/fileadmin/Proceeding2014/WS_2_11_Poppe.pdf

6. CONCLUSION

206. The bottom line still stands: without farmers, no food. Farmers are 'boots on the ground' who provide, throughout Europe´s rural areas, a series of crucial amenities. The president of the European Commission emphasised in his State of the Union speech of September this year that the EU's agriculture sector had to be preserved as a strong part of our European way of life. A modern CAP is an essential means to that end.

207. Consumers need to know that they squeeze producers at their peril. Consumers may want cheap food but how much of that money gets to the people who grow it?[147] We need healthy farms as part of a healthy supply chain.

208. Farmers never quite escape the feeling of love for animals and the land, for the quiet of winter, the fever of spring, the mildness of summer and the restlessness of autumn. Farming is an exceptional profession because it deals in exceptional circumstances and makes an exceptional contribution: providing food for people and animals. It cultivates the landscape, wrestles with nature, and strengthens the social fabric of rural areas.

209. In our view a modern CAP should have the broader scope we set out in this report and should be formulated and communicated as a 'Common European Food and Agriculture Policy'. We are convinced that in serving the people of Europe, but also and possibly even more importantly, being helpful in coping with the enormous challenges the world is facing, of which migration surely is one of the greatest, a Common Policy on Food and Agriculture is the most effective and efficient instrument to contribute to solutions for the future of agriculture and contributes to a common interest in Europe’s position in the world.

[147] A. Bailey et al., *Does the CAP still fit*?, 2016, p. 2

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The link below takes the reader to the website of the Agricultural Markets Task Force which contains, inter alia, all third party contributions which the TF received during its consultations, as well as the presentations given to it by experts during its meetings:

http://ec.europa.eu/agriculture/agri-markets-task-force/index_en.htm

ANNEXES

ANNEX A - FUTURES AND OTHER DERIVATIVE INSTRUMENTS

Margin calls

1. Initial margin, usually about 10% of the underlying value, is posted as a performance bond (to ensure the integrity of the contract). Variation margin is the daily transfer of profit and loss between the buyer and the seller of the futures contract. Settlement of profits and losses via variation margin is a method to keep counterparty risk down. The requirements to post up to 10% of the underlying value as cash and be ready to post more on adverse market moves may constitute a deterrent to the use of futures. The threat of a margin call and a forced closing-out of the position upon failure to maintain adequate cash in the account is also a deterrent in itself.

Options

2. On futures exchanges there are also 'option contracts' with futures as underlying instruments. Options allow farmers or commodity users to set their own price floors or price ceilings. It makes it possible to cover downside risk, without forgoing potential benefits if the market subsequently moves in a favourable direction.

Over-the-counter (OTC)

3. A futures market is an exchange-traded and centrally cleared instrument with initial margin as well as variation margin as a performance bond. It is part of a larger market – the market in what is called "derivative instruments" - which can be classified as securities or as bilateral contracts OTC. Futures are however at the centre of the concept since they are available on a level playing field for every participant. They also provide price discovery, which is an asset in itself for a well-functioning market for agricultural products. A liquid futures market is beneficial for specific or bespoke risk management transactions in OTC or securitised form. It is therefore important to focus predominantly on futures markets.

4. A large share of futures or forward contracts entered into by farmers and agribusiness are in the form of bilateral derivative contracts, usually referred to as OTC. The benefit of these in comparison to on-exchange futures are:

(i) counterparty risk can be handled with the credit mandates of the financial institution that also offers other banking products, often with the same client, collateralised with the same flexibility as a bank loan;

(ii) the flexibility to agree on a hedging currency, where the exchange rate is fixed, i.e. to bundle an (Foreign Exchange (FX) forward with a commodity forward;

(iii) liquidity provided as a service between the financial institution with its own market making book vis-à-vis its clients.

5. A drawback is that OTC do not necessarily add to the liquidity and price discovery of the related futures market. The limitations on the OTC market imposed by the financial regulations including but not limited to the new capital requirements on banks (EMIR and MiFID II) will thus come at a cost for the end user (e.g. farmer) and for banks which created an infrastructure which will be soon obsolete since regulators create incentives to use futures markets which are centrally cleared. A new form of intermediary built around brokered futures will have to be built to replace the old OTC trading infrastructure. This means that sufficient cash reserves need to be acquired by farmers to replace the facilities provided previously by banks. Also, a flexible means to trade FX must be put in place, and sufficient liquidity on-exchange in relevant futures markets must be ensured.

ANNEX B - THE EU LAW APPLYING TO COLLECTIVE ACTIONS

Introduction

1. Article 42 TFEU empowers the EU legislator (the Council and the European Parliament) to determine the extent to which competition rules apply to the production and trade in agricultural products, taking into account the objectives of the CAP set out in Article 39 TFEU.

2. The agriculture-specific derogations, which are laid down in the CMO, derive from the specific nature of the agricultural sector.

3. Agriculture and rural areas remain subject to multiple challenges coming from various socio-economic and environmental drivers. Agriculture has to respond to demands for the provision of public goods such as landscapes, farmland biodiversity, and climate stability and show resilience to natural disasters such as flooding, drought and fire.

4. As a land-based activity, agriculture is facing physical, logistical, economic and regulatory limits to concentration. Despite the consolidation process the majority of farms in the EU are very small (more than two-thirds of all holdings are on less than 5 hectares of agricultural land each). Roughly 75% of agricultural labour is provided by family members.[148]

5. Farmers are generally path-dependent in their production decisions. Their investments are characterised by a high degree of asset specificity, which makes them vulnerable to ex post opportunistic behaviour by processors. Because of the perishable nature of some of their products farmers are subject to hold-up situations, which contributes to making them the most exposed link in the supply chain.

6. Due to the fragmentation of the production factors, farmers tend to have weaker negotiating power in the food chain, although they are key players in the production of raw materials. Concentration in the input (animal feed and fertilisers), processing and retail sectors is higher than in the agricultural sector, which endows these parties with higher bargaining power. EU agriculture is characterised by an increasingly unstable and limited share of value added in the supply chain, due to rising input costs and global developments of supply and demand as well as variation in production linked to weather or disease.

[148] Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Farm_structure_survey_(FSS)

Agricultural derogations from competition law

Introduction

7. On the basis of Article 42 TFEU, Article 206 CMO declares competition rules applicable to the production of and trade in agricultural products save as otherwise provided by the CMO.

8. This means - in the view of many competition authorities - that under competition law the joint selling of a cooperative or a PO requires a derogation from Article 101(1) TFEU.

9. The CMO regulation contains targeted implicit and explicit derogations from competition law.

10. Generally speaking, the derogations cover two types of collective action: (i) joint selling and (ii) measures concerning the management of quantities put on the market (private supply management), either via production planning or withdrawal of products.

Producer organisations (Article 152 CMO)

11. POs' recognition criteria under the EU harmonised approach in the CMO include the planning of production and the concentration of supply as objectives which a given PO may pursue so as to gain recognition in a Member State (Article 152 CMO). This is in line with the policy goal of strengthening producers in the supply chain via POs.

12. Activities such as the common sourcing of input for its members, the storage of products and the placing of products on the market at what is commercially the 'right' moment are common practices applied by cooperatives and POs.

13. At face value, Article 152 CMO can actually be interpreted as a (implicit) horizontal derogation from competition law in favour of joint selling or the planning of production by a recognised PO these being core activities of a PO.[149] The legal situation is unclear though. Recent Commission guidelines which explain the derogations in Articles 169-171 CMO do not make reference at all to Article 152 CMO.

14. In France a case has recently been brought to the judge concerning precisely the scope of the "legal missions" of POs in relation to competition law. In the meantime the case has been referred to the ECJ and a judgement may clarify the scope of

[149] Where producers join in a *new* undertaking and cease to exist as independent competitors, the concept of an "agreement between independent undertakings" and the cartel prohibition would not apply in the first place. Such a new undertaking is however subject to the prohibition of the abuse of dominance pursuant to Article 102 TFEU. Producers/farmers in an agricultural PO normally continue to remain independent economic actors.

provisions such as Article 152 CMO.[150] Having said this, in the French '*cas endives*' the conduct at issue is not so much the collective action of one given PO but the collective arrangement of numerous such POs via an umbrella organisation of producers in the sector.

Agreements by agricultural producers (Article 209 CMO, second derogation)

15. The second of the two (explicit) exceptions in Article 209 CMO exempts from competition law agreements of *producers* concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products.[151] The provision is not limited to POs but covers agreements among producers in general.

16. It is a horizontal provision which so far has remained relatively unused and untested. It contains three negative criteria: it does not apply to agreements, decisions and concerted practices which (i) jeopardise the CAP objectives, (ii) entail an obligation to charge an identical price or (iii) exclude competition.

17. DG COMP's contribution to the TF states that "this general CAP derogation appears to prohibit mere joint sales because they lead to a common price for products of independent producers sold together in a given transaction".[152]

18. However, the question arises whether and when joint selling by a PO does actually imply an agreement including an obligation to charge an identical price within the meaning of the exclusion criterion.[153] See the discussion in the box below.

Cartel or single company behaviour? - A selling price-fixing agreement in the classical sense of competition law does normally not occur in the case where the producer grouping acquires products from its members - that is to say where the property is transferred from the members to the producer grouping - and sells the aggregated products at a single price. Here, the producer grouping acts as any other single undertaking which sources its input from various suppliers and sells at a single price.

The said competition guidelines do not take account of this specific case, perhaps due to paragraphs 2(a) of Articles 169-171 CMO which read "whether or not there is a transfer of ownership by the farmers to the producer organisation". The guidelines seem to also treat

[150] Case C-671/15, *APVE* is currently pending at the ECJ. A FR court, having referred the case to the ECJ, asks essentially about the scope of agricultural derogations from competition law.

[151] The first derogation has proved of little practical value as the ECJ has held that such measures need to be conducive to achieving *all* of the heterogeneous objectives of the CAP.

[152] European Commission - DG COMP, June 2016, *An overview of European competition rules applying in the agricultural sector*, contribution to the TF, page 2

[153] See for instance C. Busse, 2011, *Erzeugerorganisationen und Branchenverbände im EU-Agrarmarktrecht*, Jahrbuch des Agrarrechts 2011, pages 107-144

such a PO (or cooperative) as a prima facie cartel in need of a specific derogation.[154] As a result, cooperatives with high markets shares, such as in some Scandinavian countries, could therefore neither find cover under the specialisation block exemption (which applies up to a market share ceiling of 20%) nor show that there is no anti-competitive agreement between competitors in the first place; they depend on an individual exemption possibility under Article 101(3) TFEU.[155] In contrast, Marion Monti, the former Commissioner for competition, stated that while cooperatives could not enter into traditional price-fixing cartels the rules were not intended to prevent farmers who sell their products via the cooperative from receiving the same price.[156]

Some national competition authorities clearly consider such practices not to be subject to the cartel prohibition and they treat such groups of producers as single undertakings.[157] Producer groupings which negotiate a price at which their producer members are to sell *individually* (no transfer of property) are treated differently[158] but even in such situations the question arises to what extent there is a logic of ex ante price-setting by producers or rather an ex post acceptance by producers of the price that the "agent", who represents them, is able to negotiate. The answer may, again, have consequences under competition law.[159]

19. The scope of Article 209 CMO for agreements not covering prices at all is also unclear. In one of its meetings the TF heard about a Spanish idea to smooth the supply fluctuation of olive oil that is due to biological factors, and thereby reduce fluctuations in its price. The yield of olive trees often changes significantly from one year to the next, thereby causing significant price changes for olive oil. The Spanish idea would be to privately store via an APO a certain amount of olive oil in a high-yield year and then release it in a low-yield year thereby stabilising prices. According to the presentation by the Spanish cooperatives, it is still unclear, after

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[154] See paragraph 13, last sentence and paragraph 18 of the European Commission competition guidelines. Guidelines concerning the implementation of the new rules regarding joint sales by producers of olive oil, beef and veal and arable crops, OJ C 431 of 22 December 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2015:431:TOC

[155] See European Commission - DG COMP, *How competition policy helps dairy farmers in Europe*, 16 February 2010, question 9

[156] M. Monti, 13 November 2003, *The relationship between CAP and competition policy – does EU competition law apply to agriculture?*, page 4

[157] See French authorities, 20 October 2016, *Contribution des autorités françaises aux travaux de la Task Force Marchés Agricoles*, 3rd party contribution to the TF point 2. See also Ministère de l'agriculture, de l'alimentation, de la pêche, de la ruralité et de l'aménagement du territoire, June 2012, *Mission sur l'organisation économique de la production agricole*, page 13.

[158] Setting up a PO with transfer of property entails significant commercial risks, see NFU (UK National Farmers Union), *A guide to producer organisations in the dairy sector*, pages 9-10.

[159] See European Commission - DG COMP, *How competition policy helps dairy farmers in Europe*, 16 February 2010, the answer to question 5 suggests that such an arrangement (an agent "negotiating the best possible price" for the pooled quantity and not bearing any commercial risk) can be acceptable under competition rules. See also UK Office of Fair Trading, *How Competition Law Applies to co-operation between farming businesses: Frequently asked questions* November 2011 OFT740er, page 22:"competition concerns are unlikely to arise where farmers sell jointly through a co-operative *or through a commercial agent, taking whatever price the agent can get for their produce*." [emphasis added]

numerous contacts with competition authorities whether such a scheme is compatible with the applicable rules, in particular Article 209 CMO. The principle of self-assessment means that the cooperatives are unable to get up-front legal comfort. To incur fines if conduct is found to be incompatible with the rules is a risk that they do not want to take.[160]

"Crisis cartel" (Article 222 CMO)

20. The possibility to have recourse to private supply management (inter alia planning of production and withdrawals) is found in the horizontally applicable Article 222 CMO. It is tied to the existence of a severe market imbalance, is temporary, and pre-supposes that it is preceded by other public stabilisation measures. Pursuant to an ad hoc authorisation by the Commission, *separate* recognised POs (APOs and IBOs) can agree *among* them on the listed measures thus enabling what could be called a 'crisis cartel' with large coverage.

21. It does not necessarily serve the efficiency of the measure that it is construed as a measure of last resort and that it does not cover independent producers (i.e. those who do not belong to a recognised PO). In the current milk crisis, the EC has for the first time adopted an implementing act under Article 222 CMO and supplemented it by a delegated act under Article 219 CMO to overcome the problem.[161]

Article 210 CMO on interbranch organisations

22. The CMO Regulation acknowledges that for certain objectives joint dialogue and action by the various operators in the supply chain leads to the better marketing of products, promotes best practices and increases market transparency. To that end, IBOs may for example draft model (supply) contracts, publish aggregated statistical data on production costs and prices, and work on price indices or exploit (export) market potentials (Article 157 CMO).

23. Article 210 CMO provides that the cartel prohibition of Article 101 TFEU does not apply to agreements made by IBOs in order to achieve their objectives. The agreements have to be notified to the EC before their implementation. The CMO Regulation establishes limits in that such agreements may not lead to market partitioning, create distortions of competition, create discrimination or eliminate competition for a substantial proportion of the products in question. Furthermore, the agreements must not entail price or quota fixing.

24. In their daily work, IBOs sometimes find it difficult to identify the boundaries between the legitimate pursuit of their objectives acknowledged in Article 157 CMO

[160] See R. Sánchez de Puerta (Spanish olive cooperatives), 28 June 2016, presentation to the TF

[161] Commission Delegated Regulation (EU) 2016/558 and Commission Implementing Regulation (EU) 2016/559 of 11 April 2016.

and action which might be considered to be restrictions of competition.[162] This is in particular the case for price data aggregation and indices, for which IBOs want assurance that agreements are not deemed illegal information exchanges at a later stage.[163]

Sector-specific derogations

25. Sector-specific derogations exist in the CMO regulation. They are characterised by differentiated conditions and do not respond to one uniform logic.

26. Some of them allow private supply management via product withdrawals such as in the fruit and vegetables, wine or PDO/PGI ham and cheese sectors.[164]

27. Other derogations specifically enable or even enjoin POs to sell the products of their respective members. Provisions to this effect, subject to various conditions, can be found in the fruit and vegetables, sugar, fresh milk, olive oil, arable crops and bovine animals sectors.[165]

28. The 2012 milk package[166] introduced the possibility of joint selling of fresh milk by producer organisations subject to market share caps of 33% (national production) and 3.5% (EU production). There is no further conditionality attached to this possibility - which is straight-forward and applies, as the whole 'milk package' does, until 30 June 2020. In 2014, an EC report on the implementation of and experience with the milk package was published.[167] A second report will be presented at the end of 2016 and will shed light on the evolving use of the joint selling provision.

29. As regards olive oil, arable crops and bovine animals, while the provisions permit joint selling, the caps are lower than for fresh milk (15% of national production, and 20% of the relevant market for olive oil). What is more, unlike in the case of fresh milk the conditions laid down in the articles require significant integration efficiencies which hark back to concepts of classical competition law.[168] Commission guidelines from 2015 clarify the scope of these conditions. So far there

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[162] See CLIAA (French Agricultural and Agro-food Interbranch Organisation Liaison Committee), 1 September 2016, 3rd party contribution to the TF, page 3. See also Interbev, 22 June 2016, 3rd party contribution to the TF, page 2

[163] Government of Flanders (Belgium), 4 July 2016, 3rd party contribution to the TF, page 2

[164] See Articles 33, 150, 162, 166, 167, 172 CMO

[165] Articles 33, 125, 149, 160 and 169-171 CMO

[166] Regulation (EU) No 261/2012, OJ L 94, 30 March 2012, p. 38

[167] European Commission, 13 June 2014, *Development of the dairy market situation and the operation of the "Milk Package" Provisions"*, COM(2014) 354 final. Four Member States reported on contracts negotiated collectively (Czech Republic, Germany, Spain and France).

[168] See recital 139 CMO. See also P. Chauve et al, 2014, *Agriculture, Food and Competition Law: Moving the borders*, page 310, Journal of European Competition Law & Practice, 2014

seem to have been no notifications of such joint selling under the said provisions although a notification obligation is laid down in the Common Market Organisation regulation. The reasons for this are unclear but could well have to do with the complexity of the rules relating to the requisite level of efficiencies to be achieved to qualify for the derogation.

30. In the fruit and vegetables sector, the CMO provides for the withdrawal of products at minimum prices as well as 'green harvesting' and non-harvesting under certain conditions for crisis prevention and management. Article 160 CMO, applying to recognised POs in the fruit and vegetables sector, requires them to market the production of their members. In an ECJ judgement, France was actually held accountable for national rules that allowed producers to sell sizeable quantities *outside* the PO channel. The Court held that this actually undermined the goal of concentration of supply and considered EU support payments to such POs as not eligible under the regulation.[169]

31. Last but not least, the CMO provides for specific sector-induced arrangements which enable the management of supplies in the wine, PDO/PDI cheese and PDO/PDI ham sectors. Under Article 167 CMO, Member States may lay down marketing rules to regulate supply in order to improve and stabilise the operation of the common market in wines, particularly by way of decisions of recognised IBOs. Under Articles 150 (cheese) and 172 (ham) Member States may lay down - for a limited time - binding rules for the regulation of the supply of PGI products. In the olive oil sector, IBOs may have the objective of concentrating and co-ordinating supply and marketing of the produce of their members (Article 162 CMO).

Exemption possibility under classical competition law - Article 101(3) TFEU

32. Article 101(3) TFEU acknowledges that certain types of cooperation entail positive benefits which outweigh a restriction of competition. This is often the case for production agreements, which can result in substantial economic benefits by saving costs, pooling know-how and developing better production technologies. For this reason, the EU specialisation block exemption regulation exempts production agreements. It can, for example, provide cover for producers who produce and distribute a product jointly in a cooperative, up to a 20% market share ceiling.[170]

33. Competition law does normally not allow taking into account efficiencies which accrue to the producers due to a lessening of competition between them through the mere concentration of supply (joint selling); rather, the redeeming pro-competitive

[169] Judgment of Court of First Instance, 30 September 2009, T-432/07, paragraphs 54-55

[170] Block Exemption regulation: Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements

effects of practices falling under Article 101(1) TFEU would have to be identified at the exclusive level of consumers.

34. A question has recently emerged as to whether current competition law conventions allow societal benefits of collective agreements, for instance as regards sustainability initiatives, to be taken into account or whether the term "consumers" in paragraph 3 of Article 101 TFEU is limited to the *direct* consumers of the products in question. The European Commission seems to interpret Article 101(3) TFEU as not allowing taking into account benefits that derive from agreements and accrue to the society as a whole; benefits under the said provision, under this view, are limited to benefits enjoyed by the consumers of the products or services in question.[171]

[171] See Decision of the Dutch Minister of Economic Affairs of September 30, 2016, no. WJZ/16,145,098, page 14, referring to the opinion from the European Commission.

ANNEX C – HISTORY OF FINANCIAL INSTRUMENTS POLICY IN THE EU IN RELATION TO AGRICULTURE

1. FIs have been known in the area of rural development policy for more than 20 years, but before 2007 they were used only in isolated cases. Support from the European Agricultural Fund for Rural Development (EAFRD) is generally still provided predominantly through grants.

2. During the last two years, the Commission has been placing increased emphasis on FIs, pointing out their potential for added value in leveraging CAP money.

3. The Commission has also advanced with creating and implementing the European Fund for Strategic Investment (EFSI), which is so far the largest vehicle at EU level for channelling resources in the EU economy. For the period 2014-2020, FIs have become, in fact, the key policy instrument for channelling and attracting fresh resources into the EU economy, although grants remain the main form of EU/CAP spending. Under EFSI the Commission intends to mobilise EUR 500 billion of investments until 2020 in the EU. Generating investments in agriculture is mentioned as one of the specific objectives of this instrument and new opportunities for operators may be envisaged under this new scheme.

4. FIs under the EAFRD are available to operators undertaking financially viable investments in agriculture, forestry and rural areas in general terms. The use of them under the EAFRD has increased in recent years, although with a rather modest speed and only in some parts of the EU.

5. The Commission has created a number of models of FIs (so-called "off-the-shelf" models), which have been made available to Member States in the specific Implementing Regulation (EU) 964/2014 so as to facilitate the introduction and set-up of FIs by a managing authority.

6. In 2014, a specific technical assistance platform called fi-compass was established by the Commission and the EIB. Its main purpose is to support the set-up and design of EFSI FIs and the challenges encountered in doing so. In this context, a separate strand of work on the EAFRD has been developed. Recently, a 'Study on price volatility in agriculture and FIs under the EAFRD' was launched within this part of the work. In addition, a specific target has been set regarding coaching on FIs for EAFRD managing authorities.

7. In addition, in 2016 the Commission simplified the programming of FIs in rural development policy by adjusting its implementing rules to match the nature of FIs. It simplified programming requirements and made the programming of FIs unlimited in number and time, by end 2020.

8. In a further attempt to facilitate the set-up and implementation of FIs, in September 2016, the Commission proposed changes in the EAFRD Regulation (EU) No

1305/2013 as part of its ‘omnibus’ legal proposal. These changes would eliminate a number of restrictions that may impede FIs' implementation - such as the ineligibility of purchase of animals, annual plants, small-scale infrastructure, etc. They would even allow working capital linked and ancillary to non-agricultural investments to be supported.

9. The recent Commission proposals considerably simplify programming and eligibility requirements under the EAFRD and are a significant step towards enhancing the use of FIs, to the benefit of agriculture and rural development. However, the legal process has only started and will largely depend on the decisions of the co-legislators (Council and European Parliament).

ANNEX D - CHALLENGES OF SETTING UP FINANCIAL INSTRUMENTS

1. Before attributing agricultural budgetary resources (from the EAFRD) to a financial instrument, the EAFRD managing authority must undertake an *ex ante* assessment to assess the presence of market failure or sub-optimal investment situations that can be addressed by a financial instrument. The decisions on the creation, programming, implementation and closure of FIs are fully under the jurisdiction of Member States. The preferred option so far is the creation of FIs under shared implementation.

2. Member States, however, on the basis of the *ex ante* assessment, may transfer EAFRD resources to already existing EU-level FIs instead of creating and managing FIs on their own. They can also contribute to the so-called 'SME Initiative', which is a hybrid product between shared management FIs and EU-level FIs. A consistent approach has to be found between the strategic objectives of the rural development programme (RDP), the *ex ante* results and the proposed focus of investments under the FI and the EU-level instrument, based the *ex ante* assessment by the managing authority.

3. The creation of FIs by a managing authority may take a relatively long period due to the currently existing legal requirements in this field, including for public procurement. Lack of expertise is another reason delaying the process. Political considerations may also play a negative role in the decision-making steps.

Study on EAFRD financial instruments and price volatility by EIB (*fi-compass*) -

In 2016 DG AGRI launched a specific study on EAFRD financial instruments and price volatility, carried out by the EIB (via the *fi-compass* platform) in the context of the multi-annual technical assistance framework contract on financial instruments between ESIF DGs and the EIB. The study costs are covered by the technical assistance budget of DG AGRI in relation to the EAFRD.

The objective of the study is to analyse the feasibility, the possible value added and the scope of a specific FI under the EAFRD for the dairy sector, which builds upon an existing emerging market-responsive model. At a later phase, the study will also assess the potential of a similar model in other agricultural sectors. An overall objective is to base the study on real market demands and developments.

The highest level of attention paid so far by EAFRD managing authorities to financial instruments concerns financing support for farmers. While non-agricultural rural businesses are not excluded, agriculture has been at the centre of all *ex ante* assessments for FIs carried out so far and is a leading sector in terms of funding and investment volumes under the EAFRD. It is also a sector in which output (and hence farmers' incomes) is often affected by market and non-market developments. This in turn makes access to funding an extremely important matter.

In this context, access to medium- and long-term finance for farmers can often be hindered by the high level of price volatility that characterises certain agricultural markets. Volatile prices can be a result of: agricultural production cycles, with often-low prices during high-

supply periods; exposure of the sector to weather events with adverse effects on production volumes and quality; trade measures such as closure of borders; and under-developed local supply chains and/or the predominant role of intermediaries.

Price volatility creates a level of uncertainty which increases risks for both agricultural producers and for the financial institutions providing finance to these producers for agricultural investments. Further, the borrower may be discouraged from undertaking the activity due to unpredictable revenue streams, and insurance or income support tools are not always available to mitigate the price risks.

The study is expected to provide possible options for EAFRD FIs that can already be implemented in the 2014-2020 programming period to address the above concerns. Its findings, recommendations and final output (such as newly designed FIs) could also be taken into account for the post-2020 period if/when a new Common Agricultural Policy (CAP) is put in place. Its results are expected by mid-2017.

ANNEX E – IGOR ŠARMÍR'S CONTRIBUTION

Limites potentiels du processus de libéralisation des marchés agricoles dans l'UE

La libéralisation des marchés en général est certainement un trait caractéristique de l'évolution de l'économie mondiale depuis plus d'un siècle. Il est également vrai, que depuis 30 ans à peu près, cette évolution a connu une accélération considérable, et aujourd'hui, si on parle de la mondialisation, on pense surtout au processus de libéralisation des différents marchés à l'échelle mondiale.

Ceci est encore plus vrai dans l'UE, qui, malgré ses ambitions très variées, reste surtout un marché unique. Ce fait est incorporé aussi dans les documents fondamentaux constituant l'UE, comme les traités de Rome et de Lisbonne où la libre circulation des capitaux, des marchandises, des services et des hommes est un socle du droit européen, supérieur aux autres priorités déclarées. Evidemment, en Europe les choses sont nettement plus faciles qu'à l'échelle mondiale car les disparités économiques et sociales entre les États Membres y sont certainement moindres qu'entre les pays développés et ceux en voie de développement dans le monde. Il en résulte que si les négociations WTO sont bloquées depuis 2004, les libéralisations en Europe, elles, continuent.

Le secteur agricole en Europe n'est pas épargné par les libéralisations et déréglementations, et ce, malgré l'existence de la PAC, qui par l'intermédiaire des possibilités d'intervention variées devrait rendre le marché agricole plus stable. La mesure récente la plus visible (mais aussi la plus contestée) a été la suppression des quotas laitiers. La libéralisation des marchés agricoles donc continue, malgré les déclarations systématiquement répétées des dirigeants européens soulignant l'exception agricole liée au rôle multifonctionnel de l'agriculture (voir ci-dessous), qui justifierait la sortie de l'agriculture des règles strictes de concurrence.

Une libéralisation raisonnable et progressive des marchés en général est certainement une bonne chose : en limitant des interventions des Etats elle rend la concurrence plus juste, oblige les opérateurs économiques à rechercher la compétitivité et à innover, et elle peut être profitable aux consommateurs grâce à une réduction constante des prix. D'autre part, une libéralisation débridée et irréfléchie peut provoquer des déséquilibres considérables avec des conséquences souvent dramatiques. Il faut donc rechercher la réponse à la question suivante: qu'est-il possible d'attendre de positif des libéralisations des marchés et quelles en sont les conditions ? Autre question: à partir de quel moment la libéralisation des marchés devient-elle problématique et pourquoi ?

Il est sûr qu'une concurrence de plus en plus libre est favorable à la rentabilité économique, et aux préoccupations économiques à court terme ; il n'en va ps de même à long terme. Répondre aux défis stratégiques est souvent opposé à la recherche de la rentabilité immédiate ; cela demande une sorte de planification et le rejet des bénéfices immédiats au profit des objectifs stratégiques à long terme. Mais ce comportement n'a rien à voir avec la logique de marché et l'expression « planification » est même devenue un peu péjorative à cause de l'application à grande échelle de ce

concept dans les économies inefficaces des anciens pays communistes. Néanmoins, les défis stratégiques à moyen et long terme existent (par exemple le changement climatique) et il n'est pas possible de les négliger longtemps.

Les écarts économiques entre les pays et les régions dans le monde sont un autre obstacle à une libéralisation rapide et illimitée des marchés mondiaux. Les économies des pays pauvres n'ont aucune chance de faire face à la concurrence des opérateurs économiques des pays développés, elles s'écroulent rapidement avec des conséquences humaines souvent dramatiques. Dans ces cas-là, l'expression « libre concurrence » est totalement dépourvue de sens. Il faut rappeler que pendant la seconde moitié du 19e siècle, le marché américain a été hyper protégé, idem pour la Chine au cours des dernières décennies du siècle suivant. Les deux pays n'ont ouvert leurs marchés que plus tard, quand ils sont devenus capables de faire face à la concurrence internationale. La libéralisation des marchés internationaux ne peut être bénéfique qu'à condition de mettre en concurrence libre uniquement des pays dont le niveau économique est comparable. Ceci est probablement la raison principale de l'échec de l'Organisation Internationale du Commerce, matérialisé par les craintes des pays pauvres relatives à l'agriculture.

Défis d'une libéralisation illimitée des marchés agricoles dans l' UE

Il a été dit ci-dessus qu'une libéralisation raisonnable des marchés, respectant certaines conditions et certaines contraintes, peut être généralement bénéfique. Ceci est particulièrement vrai pour les marchés agricoles, où les contraintes et les rôles à accomplir sont très spécifiques. Ci-dessous, je vais développer trois d'entre eux.

1. Nécessité d'une modification progressive du modèle agricole dominant

L'essor du modèle agricole dominant est étroitement lié au marché de plus en plus libéralisé, respectant des priorités et des contraintes d'une rentabilité de court terme : exploitations agricoles de plus en plus grandes, élevages de plus en plus nombreux, animaux qui ne voient jamais le soleil, séparation de l'élevage et de la productions végétale, recours massif aux engins agricoles lourds et très puissants, recours massif aux intrants chimiques etc. Ce modèle est désigné par une expression péjorative « agriculture industrielle » car ce type de production agricole fait penser à une chaîne de montage. Il est vrai que ce modèle (notamment la mécanisation et les intrants chimiques) était porteur de la révolution verte d'après-guerre, qui a permis de produire, pour la première fois dans l'histoire, suffisamment de denrées alimentaires pour tout le monde. D'autre part, il est de moins en moins exigeant en main d'œuvre. Du fait de l'essor de l'agriculture industrielle, l'agriculture familiale traditionnelle, fierté de la plupart des pays de l'Europe occidentale, est en crise, ce qui a des conséquences dramatiques : selon l'eurodéputé José Bové, en France, 600 agriculteurs se sont suicidés en 2015. De moins en moins d'agriculteurs âgés ont un successeur naturel, car dans ces conditions l'agriculture a perdu son attractivité et les jeunes ont tendance de choisir un autre métier.

Cependant, comme je l'ai déjà dit, l'agriculture industrielle répond parfaitement au marché de plus en plus libéralisé.

Mais il y a un problème : ce modèle n'est pas durable. Il est nuisible à l'environnement et a besoin de ressources illimitées. Or, aujourd'hui, à la différence de la période d'après-guerre, nous savons très bien que les ressources agricoles ne sont pas illimitées : l'eau douce devient de plus en plus rare et ce problème sera aggravé, même en Europe, par les changements climatiques. Or, l'agriculture industrielle est très gourmande en eau. Idem pour les sols. Les mécanismes lourds et les pesticides provoquent la dégradation des sols (en tuant par exemple la microfaune dans les terres) et la fertilité naturelle doit être de plus en plus remplacée par des engrais synthétiques. Néanmoins, les matières premières pour la production des engrais chimiques s'épuisent également. L'image des pesticides auprès de la population se dégrade progressivement, et les preuves scientifiques mettant en évidence leur extrême dangerosité s'accumulent. Les difficultés connues par le glyphosate, dont l'autorisation d'utilisation en UE devait être prolongée au plus tard le 30 juin dernier, montrent que la période d'utilisation massive des pesticides s'achève progressivement. Et une règlementation efficace des perturbateurs endocriniens (dont un grand nombre de pesticides) deviendra le clou dans le cercueil des pesticides, même si cette réglementation n'est pas pour demain.

L'alternative existe et s'appelle « l'agriculture écologique intensive » . Ce concept prévoit une connaissance scientifique approfondie des terroirs ainsi que des moyens naturels destinés à rendre les sols plus fertiles et à lutter contre les ravageurs. Selon des agronomes renommés, tels que Marc Dufumier, Bruno Parmantier ou Claude et Lydia Bourguignon, ce modèle devrait être sur le plan économique au moins aussi efficace que l'agriculture industrielle. De plus, l'agriculture écologiquement intensive est plus exigeante en main d'œuvre qualifiée, ce qui est positif dans le contexte d'un chômage endémique en Europe. L'opinion de ces experts agricoles est aussi partagée par les experts en matière de faim dans le monde, comme Jean Ziegler et Olivier de Schutter, anciens rapporteurs généraux de l'ONU au droit à l'alimentation.

Seulement, une période de transition, plus ou moins longue, ainsi qu'une volonté politique, qui fait défaut pour l'instant, sont nécessaires. Il est sûr que cette transition ne peut pas être assurée par les seules force de concurrence et par le marché libéralisé, mais demande le soutien et l'intervention des autorités publiques.

2. Changements climatiques

Les changements climatiques représentent un défi considérable non seulement pour l'économie mondiale, mais aussi pour la survie de la planète. Malgré l'existence des climatosceptiques, il est aujourd'hui possible de parler d'un consensus politique et scientifique relatif à l'ampleur de ce phénomène et au rôle crucial des activités économiques de l'homme. Les engagements pris par les dirigeants politiques du monde entier à l'issue de la conférence internationale sur le climat, qui a eu lieu à Paris à la fin de l'année 2015, le montrent très clairement. Il est surtout inévitable de réduire considérablement des émissions de CO2, dont une source importante est le transport routier, qui se développe constamment. Mais, que se passe-t-il en réalité ? Au lieu de soutenir la production agricole locale et un comportement locovore des populations, les produits agricoles et alimentaires voyagent de plus en plus à travers l'Europe et le monde

entier. C'est au Royaume-Uni qu'avait été inventé le concept de food mile (kilomètre-aliment), mesurant la distance parcourue par un aliment entre son lieu de production et celui de sa consommation. The Independent a révélé qu'en Europe la moyenne des kilomètres-aliments était de… 3000. Ainsi, une famille anglaise type, avec ses quatre membres, émettait chaque année 4,2 tonnes de CO2, par ses appareils domestiques, 4,4 avec sa voiture, mais 8 à cause du mode de production, d'emballage et de distribution de sa nourriture. Et ces chiffres datent de 1993 et depuis ce temps-là, les déplacements des produits agroalimentaires dans le monde ont connu une croissance exponentielle.

Malgré les déclarations politiques, une volonté politique digne de ce nom, pouvant renverser cette évolution néfaste et dangereuse, fait défaut (manifestement, on ne fait pas la liaison entre les engagements concernant la lutte contre les changements climatiques d'une part et les autres priorités politiques globales d'autre part). Et l'une des preuves en est la promotion constante du libre-échange, qui est la priorité politique numéro 1 (supérieure à la nécessité de lutter contre les changements climatiques), même si personne ne le dit à haute voix. La meilleure preuve en est la préparation des accords bilatéraux de libre-échange (TTIP en premier lieu), car leur mise en œuvre aura certainement pour conséquence une augmentation importante des flux commerciaux, des produits agricoles entre autres, et une augmentation importante des émissions de CO2. La promotion du libre-échange, au-delà de la situation actuelle, revient à la promotion du transport polluant, ce qui est incompatible avec les engagements politiques en matière de climat.

Il semble donc qu'en ce cas-là aussi, une action politique des autorités publiques au plus haut niveau soit nécessaire.

3. Le concept de "taux raisonnable d'autosuffisance alimentaire des pays et des régions" est-il un concept dépassé ?

L'autosuffisance alimentaire, ou au moins son taux raisonnable, ne sont pas aujourd'hui « à la mode ». Au niveau des institutions européennes, ce concept ne fait même pas partie du débat. On peut en inférer qu'il est manifestement considéré par les dirigeants politiques comme arriéré ou dépassé. « L'autosuffisance alimentaire » a en fait cédé la place à la « sécurité alimentaire », mais cette dernière peut être assurée non seulement par la production sur place, mais aussi par les importations. Ceci est vrai non seulement pour les Etats Membres ou les unités territoriales de taille plus limitée, mais aussi pour l'UE en tant que telle. Et ce n'est pas tout : si, d'une part, l'importance d'assurer une partie décisive des denrées alimentaires pour la population à partir de la production locale est sous-estimée et négligée, d'autre part on insiste de plus en plus sur l'importance des échanges commerciaux internationaux. Différentes « barrières commerciales » sont progressivement levées afin que seule une « concurrence libre et non faussée » puisse décider dans quelle mesure la population d'un pays sera ravitaillée par les aliments produits dans l'Etat Membre concerné ou bien par les denrées alimentaires importées.

Cet état de choses n'est cependant pas dépourvu de risques et certaines questions doivent être prises en compte et étudiées attentivement, si nous voulons évaluer la pertinence et l'orientation favorable du développement récent.

- Tout d'abord, il s'agit de l'aspect stratégique, dont l'importance va progressivement croître : l'autosuffisance alimentaire signifie en fait l'indépendance du pays dans le domaine le plus important pour la population. Les changements climatiques donneront progressivement à cet aspect stratégique de l'autosuffisance alimentaire un poids particulier compte tenu des fluctuations attendues, de plus en plus élevées, du volume et de la qualité des produits agricoles, ainsi que de leur prix. Renoncer aujourd'hui au concept « taux raisonnable de l'autosuffisance alimentaire » revient à exposer la population du pays concerné, dans un avenir proche ou plus lointain, à des risques non négligeables (car l'Etat ne sera plus en mesure d'atténuer les chocs de ces fluctuations).

- Selon la tradition européenne, matérialisée dans l'Acquis Communautaire, le rôle de l'agriculture ne se limite pas à la production de la matière première de haute qualité pour les denrées alimentaires, mais elle doit également assurer d'autres fonctions. Pour cette raison on parle de la multifonctionnalité de l'agriculture : elle doit être porteur du développement rural, elle doit assurer une existence digne pour les gens vivant à la campagne, prévenir l'exode rural et par l'intermédiaire des procédés agraires appropriés ainsi que par une coexistence de la production végétale et de l'élevage, elle doit sauvegarder le potentiel agraire pour les futures générations. Or, s'il n y a pas de débouchés pour la production, il n'y aura pas d'agriculture, et les priorités mentionnées ci-dessus ne pourront pas être respectées. De plus, les gens perdront progressivement leur savoir-faire et une partie des sols fertiles, qui seront dans l'avenir de plus en plus rares, vont être occupés (et donc détruits) par les bâtiments, particulièrement par des centres de logistique (un phénomène d'ores et déjà assez visible en Slovaquie).

A cause de l'ensemble des arguments mentionnés ci-dessus, l'UE devrait tenir à l'autosuffisance des Etats Membres en matière de production des marchandises agroalimentaires de base (au moins dans les pays où les conditions naturelles sont favorables). Le concept de « taux raisonnable de l'autosuffisance alimentaire » n'exclut pas le commerce international, il insiste seulement sur le fait que le rôle du commerce est d'enrichir et de compléter l'offre locale, mais pas de la remplacer.

Le fait que la sécurité alimentaire de plusieurs Etats Membres est de plus en plus assurée par les importations à partir d'autres Etats Membres (ou depuis les pays tiers) est présentée d'habitude comme le résultat d'une concurrence normale, où les entreprises agroalimentaires locales se montrent peu compétitives. Etant donné que cette conclusion est souvent contestée, elle mérite 'une petite analyse.

La concurrence internationale au sein de l'UE agit de manière très stricte : la variable décisive est la compétitivité des opérateurs économiques, qui se traduit par les prix des marchandises offertes sur le marché. Celui qui est capable de proposer un prix

moins élevé, gagne. Les pays post-communistes de l'Europe centrale et orientale devraient jouir, grâce à une main d'œuvre toujours relativement bon marché, d'un avantage concurrentiel par rapport à l'Europe occidentale. Néanmoins la réalité montre que les choses ne sont pas si simples que cela : si d'une part la Slovaquie est devenue très rapidement une superpuissance mondiale dans le domaine de la fabrication des automobiles, d'autre part son secteur agroalimentaire est en voie de disparition. Comment expliquer cette contradiction dans une situation où l'avantage concurrentiel de la Slovaquie devrait être la réalité non seulement pour l'industrie automobile, mais aussi pour le secteur agroalimentaire ? Et puis, afin d'approvisionner le marché slovaque, un moindre coût de transport devrait renforcer l'avantage des produits agroalimentaires slovaques par rapport à ceux qui sont importés, et le savoir-faire des agriculteurs et des transformateurs slovaques n'est certainement pas inférieur à celui des travailleurs dans l'industrie automobile. Malgré tout cela, nous sommes confrontés au paradoxe suivant : si dans le domaine de l'industrie automobile la Slovaquie est indéniablement « compétitive », il semble que la compétitivité lui fasse défaut dans le secteur agroalimentaire. Les meilleures preuves en sont la perte dramatique de l'autosuffisance alimentaire du pays , qui se situe aujourd'hui au niveau de 40% et le bilan catastrophique du commerce extérieur pour les produits agroalimentaires. Le paradoxe est suffisamment important pour être répété : malgré un prix de la main-d'œuvre nettement plus élevé et les frais de transport, les grands opérateurs commerciaux transnationaux font parcourir aux produits agroalimentaires d'origine Europe occidentale des centaines de kilomètres pour les acheminer non seulement en Slovaquie mais aussi dans les pays post-communistes voisins ! Il semble qu'il y a un problème avec cette « concurrence libre et non faussée », dont on n'arrête pas de vanter les bienfaits. Une des causes visibles de cette situation est le fait, que dans les pays de l'Europe centrale et orientale la grande distribution est presque entièrement dans les mains des multinationales étrangères (Billa, Kaufland, LIDL, Ahold, Carrefour, Auchun, Tesco, METRO…), et des indices sérieux suggèrent que la grande distribution applique des conditions commerciales différentes par rapport à chaque fournisseur (avec des marges commerciales différentes). Au lieu d'être « libres et non faussées », ces conditions de concurrence semblent être assez déformées.

Indépendamment de la pertinence et de l'exactitude de l'analyse ci-dessus il est évident que si l'évolution actuelle continue, une agriculture digne de ce nom n'existera bientôt plus que dans certains pays et aura disparu dans d'autres, ce qui est en contradiction avec plusieurs priorités officielles de l'UE. Il apparaît donc que la sous-estimation du concept de « taux raisonnable d'autosuffisance alimentaire des pays » est une erreur, qui pourra dans l'avenir être à l'origine de risques sérieux pour la population ainsi que source de problèmes politiques graves. Il est également évident qu'un « taux raisonnable d'autosuffisance alimentaire des Etats Membres» ne pourra pas être assuré par la seule action des forces du marché et de la libre concurrence.

Eté 2016

Igor Šarmír, membre de l'AMTF