

AGRICULTURAL MARKETS TASK FORCE

ISSUE PAPER

Subject: Collective self-help tools and the EU regulatory environment

1. COLLECTIVE ACTION

In the given context collective self-help tools refer in principle to collective action taken by a group of farmers to achieve common interests related to their agricultural business (horizontal cooperation). The incentive to do so stems from commercial or other (e.g. landscape, sustainability, climate change, animal welfare) advantages that can be achieved jointly or more efficiently achieved jointly as compared to acting alone.

Collective action can cover all of the commercially relevant activities of farmers from planning of production to putting products on the market. The measures may also involve operators downstream of primary production such as processors and retailers (vertical cooperation).

Collective action tends to be "institutionalised" rather than one-off: typical forms of organisation at producer level are cooperatives and producer organisations ("POs")¹. Inter-branch organisations ("IBOs")² or trilateral contractual arrangements (producers – processors – retailers) may play a relevant role in vertical cooperation.

2. CAP AND PRODUCER COOPERATION

One of the key objectives of the agricultural policy implemented by the EU has been, since its conception, to overcome the atomisation of agricultural producers. The Common Agricultural Policy ("CAP"), the EU's agricultural policy, actively promotes farmers' organisation and collective action through POs and their associations ("APOs"). The CMO regulation's ("CMO") preamble gives the following reasons:³

"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

¹ Cooperation among producers has of course existed prior to the CAP. Cooperatives are recognised and specifically governed in some Member States (e.g. Germany has had a Law on Cooperatives since 1889). The CAP (CMO regulation) encourages and governs farmers' organisation mainly via the concept of producer organisations.

² In IBOs, producers, processors and sometimes also retailers are represented in one (non-commercial) organisation.

³ 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

*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."*⁴

The CMO thus acknowledges a series of efficiencies, including the concentration of supply and the planning of production that can help strengthen the position of producers in the supply chain.⁵

Recognition criteria for POs (APOs) and IBOs as well as their activities are now generally harmonised at the EU level. In some sectors, recognition of compliant POs is mandatory. Recognised POs are granted certain regulatory advantages under EU market legislation, including derogations from competition law. EU legislation not only provides a common regulatory framework but also foresees financial support for the setting up of POs under Rural Development.

POs and cooperatives can be valuable incubators for innovative solutions and approaches in the supply chain, thereby contributing to its smooth functioning and adequate reactivity to consumer demand and societal preferences. The sharing of best practices and dissemination of know-how should be encouraged and welcomed whether it relates to contractualisation practices in the chain⁶ or innovation in helping to manage farmers' price risk⁷ to give just two examples. POs can help in this regard too.

Under the CAP's rural development policy groups of farmers can benefit from support for investments, promotion activities or environmental management. Rural development policy is not the only source of support for groups of farmers. Also under Pillar I of the CAP, investment support is granted to POs (APOs and IBOs) under the wine support programmes, olive oil triennial work programmes or fruit and vegetables operational programmes.

⁴ Recital 131 of Regulation (EU) No 1308/2013

⁵ See also *Support for Farmers' Cooperatives*, final report, November 2012, Wageningen University, http://ec.europa.eu/agriculture/external-studies/2012/support-farmers-coop/fulltext_en.pdf

⁶ See for example *Coop de France* publication "*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>

⁷ See the use of futures discussed in the last meeting of the TF. See also, for example, volatility management schemes such as Glanbia Ingredient's "Index Fixed Milk Price Scheme" and the "Fixed Milk & Feed Price Scheme" allowing farmers to lock in feed and milk prices for 2-3 years. 60% of Glanbia Ingredients is owned by the Glanbia cooperative.

3. THE LAW APPLYING TO PRODUCER ORGANISATION

3.1. Introduction

While collective action of agricultural producers (and their downstream partners) is covered by (enabling) CAP legal provisions it is also subject to European (and national) competition law.

Agreements between undertakings which restrict competition are in principle prohibited under Article 101(1) TFEU with a view to safeguarding effective competition.⁸ EU agricultural and competition law foresee exceptions to this prohibition.

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.

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

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.

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 5ha of agricultural land). Roughly 75% of agricultural labour is provided by family members.⁹ Productivity has stagnated.

Farmers are generally path-dependent in their production decisions. Their specific investment decisions mean that they cannot quickly change production. Because of the perishable nature of some of their products they are subject to hold-up situations, which contributes to make them the most exposed link in the supply chain.

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 fertilizers), the processing and the retail sectors is higher than in the agricultural sector, endowing these actors with higher bargaining power. EU agriculture is characterised by an increasingly unstable and limited share of value added in the food chain, due to rising input costs, global

⁸ 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.

⁹ Eurostat, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Farm_structure_survey_\(FSS\)](http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Farm_structure_survey_(FSS))

developments of supply and demand as well as variation in production linked to weather or disease.

3.1. Agricultural derogations from competition law

3.1.1. Introduction

Judgements by the European Court of Justice ("ECJ") have emphasised the primacy of the objectives of the CAP over those of competition policy.¹⁰ The ECJ has also held that the maintenance of effective competition in the market for agricultural products is one of the objectives of the CAP and the common organisation of the relevant markets¹¹. Article 39 TFEU lists both consumer and producer welfare among the objectives of the CAP.¹²

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

It is noteworthy that EU law does not currently feature an explicit general derogation from the cartelisation prohibition enshrined in Article 101(1) TFEU in favour of agricultural cooperatives or producer organisations. In contrast, the US legal order contains such a general derogation for a cooperative's joint selling in the *Capper Volstead Act*.

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

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

¹⁰ Judgment of 5 October 1994 in Case C-280/93 *Germany v. Council of the European Union*, paragraph 61

¹¹ Judgment of 9 September 2003 in Case C-137/00, *Milk Marque*, 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.

¹² According to Article 39 TFEU, the CAP objectives are (emphasis added):

- a. to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- b. to **ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;**
- c. to **stabilise markets;**
- d. to assure the availability of supplies and
- e. to **ensure that supplies reach consumers at reasonable prices."**

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.

3.1.2. *Producer organisations (Article 152 CMO)*

POs' recognition criteria under the EU harmonised approach in the CMO include the *planning of production* and the *concentration of supply* as objectives 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 (see footnote 4).

Activities such as the common sourcing of input for its members, the storage of products and the putting of products on the market at the commercially "right" moment are common practices used by cooperatives and POs.

Article 152 CMO could 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.¹³ Such reading is not uncontested, though. In the *Endives* case, the ECJ may have an opportunity to clarify the scope of provisions such as Article 152 CMO.¹⁴

3.1.3. *Agreements concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products (Article 209 CMO, second derogation)*

The second of the two (explicit) exceptions in Article 209 CMO regulation exempts certain agreements from competition law.¹⁵ It applies to 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. The provision is not limited to POs only but covers producers in general.

It is a horizontal provision which so far has remained relatively unused and untested. It contains two negative criteria: it does not apply to agreements, decisions and concerted practices which (i) entail an obligation to charge an identical price or (ii) by which competition is excluded.

¹³ 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.

¹⁴ Case C-671/15, *Endives* 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.

¹⁵ 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.

The first negative criterion has been assumed to exclude the practice of joint selling of producers at a common price (see for example the implicit assumption of the EC guidelines on Articles 169-171 CMO).¹⁶ Having said this, questions have been raised as to whether joint selling by, say, a PO does actually imply an *agreement including an obligation to charge an identical price* within the meaning of the exclusion criterion.¹⁷

Some national competition authorities (e.g. France) seem to treat a cooperative which buys products from its producer members - that is to say it acquires the property over the products - and sells them at a common price as a single undertaking and not as a cartel of its (independent) producer members.¹⁸

3.1.4. "Crisis cartel" (Article 222 CMO)

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, pre-supposes that it is pre-ceded by other public stabilisation measures; pursuant to an ad hoc authorisation by the EC, 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.

It is open to discussion whether it serves 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.¹⁹ It is too early to assess the effect of this authorisation on producers.

¹⁶ On 27 November 2015, the EC adopted 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>

¹⁷ A producer organisation (buys and) aggregates the products produced by its members and sells the bundle at a common price. Is this tantamount to an agreement between competitors (the POs members) *to charge an identical price*, assuming that the quantities at stake are not sold by the members individually but by the PO? The PO negotiates the sales contract - to the extent is not a price-taker - including the price but it does normally not *charge a price* (pre-)agreed by its members. Should the PO be considered just as any other single undertaking which sources its input from various suppliers and sells at a common price? See also C. Busse, 2011, *Erzeugerorganisationen und Branchenverbände im EU-Agrarrecht*, Jahrbuch des Agrarrechts, p. 107-144.

¹⁸ June 2012, *Mission sur l'organisation économique de la production agricole*, Ministère de l'agriculture, de l'alimentation, de la pêche, de la ruralité et de l'aménagement du territoire, page 13, <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000060.pdf>

¹⁹ Commission Delegated Regulation (EU) 2016/558 and Commission Implementing Regulation (EU) 2016/559 of 11 April 2016.

3.1.5. *Article 210 CMO on IBOs*

The CMO Regulation acknowledges that for certain objectives the 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, prices and work on price indices or exploit (export) market potentials (Article 157 CMO).

Article 210 CMO provides that the cartel prohibition of Article 101 TFEU does not apply to agreements of IBOs in fulfilment of their objectives. The agreements have to be notified to the EC before their implementation. The CMO Regulation establishes clear 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.

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 and actions which might be considered to be restrictions of competition. This is in particular the case for price data aggregation and indices, for which IBOs want assurance that agreements are deemed illegal information exchanges.

3.1.6. *Sector specific derogations*

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

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.²⁰

Other derogations specifically enable or even enjoin POs to sell the products of their respective members. Provisions to this effect, subject to different conditions, can be found in the fruit and vegetables, sugar, fresh milk, olive oil, arable crops and bovine animals sectors.²¹

It was the 2012 milk package²² which 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). The milk package applies until 30 June 2020. In 2014, an EC report on the implementation and experience with the milk package was published.²³ A second report will be presented in autumn of this year.

²⁰ See Articles 33, 150, 162, 166, 167, 172 CMO regulation.

²¹ Articles 33, 125, 149, 160 and 169-171 CMO regulation.

²² Regulation (EU) No 261/2012; OJ L 94, 30.3.2012, p. 38

²³ 2014 Report on operation of Milk Package, http://ec.europa.eu/agriculture/milk/milk-package/index_en.htm

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 integration efficiencies which hark back to classical competition law.²⁴ EC guidelines from 2015 clarify the scope of these conditions.

Article 160 CMO applies to recognised POs in the fruit and vegetables sector and requires them to directly 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.²⁵

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

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 could, for example, provide cover for producers who produce and distribute a product jointly in a cooperative up to a 20% market share ceiling.²⁶

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

4. ISSUE

Questions about the precise scope of the regulatory constraints under competition and agricultural law applying to producer cooperation are not a new issue. But the increased market orientation of EU agriculture as a result of a reformed CAP and the trend to less public intervention in markets keep adding to the importance of clear answers. Self-organisation and collective action of farmers constitute in principle valuable tools for the

²⁴ See recital 139 CMO. See also P. Chauve, A. Parera, A. Renkens, 2014, *Agriculture, Food and Competition Law: Moving the borders*, p. 310, *Journal of European Competition Law & Practice*, 2014

²⁵ Judgment of Court of First Instance, 30 September 2009, T-432/07, paragraphs 54-55

²⁶ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1218&qid=1399461318146&from=EN>

strengthening of the farmers' position in the supply chain, not least as a pathway to access to innovation and adaptation strategies concerning market developments.

Beyond this, cooperation in the supply chain is also increasingly seen as a means to overcome collective action problems in situations where externalities and market failure exist. Collective action holds the promise of factoring in such externalities, sometimes by way of harnessing the entire food chain promoting societal preferences as opposed to the preferences of the consumers of the specific product at issue.

And yet, regulatory tension does persist. While agricultural legislation lists the concentration of supply and the planning of production as possible key activities for POs, competition law considers quantity planning agreements among producers or joint selling in principle anti-competitive. Under competition law, only efficiencies generated and passed on to the consumers of the product can exceptionally redeem such agreements.

Any perceived lack of clarity concerning the applicable rules is liable to have a chilling effect on the self-organisation possibilities of farmers. 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. This is inefficient and would benefit lawyers instead of producers. Lack of legal clarity also risks giving rise to diverging approaches of national competition authorities and may affect the internal market.

Clear and workable rules are important for tackling the problem of the atomised structure of the farming sector through producer organisation. In fostering cooperation among farmers clear rules would allow for the creation of efficiencies in production, processing, marketing and distribution. By the same token, they would improve the position of farmers in the food supply chain and empower them in negotiations with operators downstream. This would also be consistent with the broad effort by the EC and the Member States to tackle unfair trading practices in the supply chain.

5. QUESTIONS

1. Is there a need for specific agricultural derogations from the normally applicable competition rules as regards producer organisations?
2. Should POs (cooperatives) be able to jointly sell and plan production such as is their legal mission (and obligation in the fruit and vegetables sector) under the EU agricultural framework? Which conditions, if any, ought to apply?
3. Is there sufficient legal certainty for farmers as regards the regulatory constraints concerning collective action under the applicable legal provisions? Is there sufficient legal clarity as regards possible constraints on inter-branch (sustainability) schemes? What can be done, if anything, to improve legal clarity?
4. Which types of collective action do matter for farmers in real life? Which actions promise to strengthen the farmers' situation in the supply chain?

5. What concrete collective actions can be taken by actors in the supply chain to address price volatility? Are mutual funds or other mechanisms to share the price risk useful? Is there sufficient legal certainty about the possible options in this regard?
6. Is there sufficient legal certainty for IBOs as regards the fulfilment of their objectives under the CMO Regulation? Is it necessary to provide clarification on the scope of the applicable legal provisions?

6. READING LIST

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- 2014 Report on operation of Milk Package (http://ec.europa.eu/agriculture/milk/milk-package/index_en.htm)
 - European Commission, DG AGRI website, http://ec.europa.eu/agriculture/producer-interbranch-organisations/index_en.htm
 - European Commission, DG COMP website, http://ec.europa.eu/competition/sectors/agriculture/overview_en.html
 - External study: "EP pilot project: Support for Farmers' Cooperatives", Final report - November 2012, http://ec.europa.eu/agriculture/external-studies/support-farmers-coop_en.htm
 - 2013 OECD Report on the Competition issues in the Food Chain industry <https://www.oecd.org/daf/competition/CompetitionIssuesintheFoodChainIndustry.pdf>