

## *An overview of European competition rules*

### *applying in the agricultural sector*

#### **1. Background**

- The Treaty on the Functioning of the European Union (TFEU) provides a specific status for the agricultural sector with regard to competition rules. Article 42 TFEU gives unique powers to the EU legislator to decide *to what extent* the competition rules set out in the TFEU apply to the sector, *taking into account the five objectives of the Common Agricultural Policy (CAP)*. Article 39 TFEU defines CAP objectives as follows: increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies and ensuring reasonable prices for the consumer.
- According to Article 42 TFEU the EU legislator determines the extent of the application of competition rules to the agricultural sector, taking into account all the objectives of the CAP set out in Article 39 TFEU. According to the Court of Justice that provision recognises the precedence of the objectives of the agricultural policy over the aims of the Treaty in relation to competition<sup>1</sup>.
- The EU legislator has decided that the competition rules set out in the TFEU apply to the agricultural sector subject to a number of derogations and exemptions. This principle is laid out in the basic act for agricultural markets, the CMO Regulation<sup>2</sup>.
- There is one CAP derogation for periods of crisis ("severe market imbalances")<sup>3</sup> and there are a number of CAP derogations applying in any market situation. This DG Competition memo focuses on situations other than crisis situations and describes thus the latter CAP derogations: they include "general CAP derogations" applying to all agricultural sectors as well as "product specific CAP derogations" for specific products.
- The application of the competition rules set by the TFEU to the agricultural sector also means that it can benefit from exemptions under these competition rules that are relevant for activities of agricultural producers. This DG Competition memo also describes briefly these exemptions.

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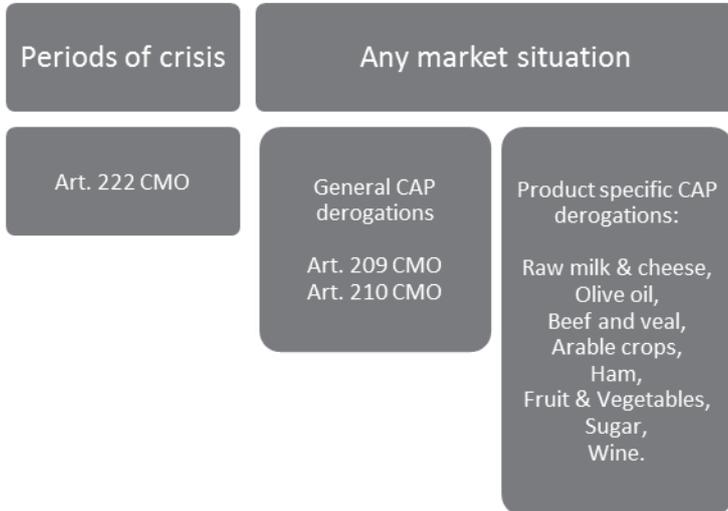
<sup>1</sup> Judgment in *Maizena*, 139/79, EU:C:1980:250, paragraph 23; Judgment in *Germany v Council*, C-280/93, EU:C:1994:367, paragraph 61.

<sup>2</sup> 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 and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation).

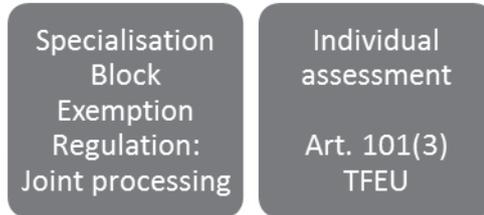
<sup>3</sup> Article 222 of Regulation of the CMO Regulation.

# CMO Regulation

## CAP derogations



## Competition rules



- A case is currently pending before the Court of Justice which raises the issue of whether certain measures adopted by producer organisations which may be necessary to attain the objective of those organisations are also outside the scope of the rules on competition even though the CMO does not expressly consider them<sup>4</sup>.
- Today, as in the past, agricultural producers often face a number of challenges that can negatively affect their livelihood: production volatility due to weather conditions, fluctuating demand of agricultural commodities, atomisation of land, farms and production facilities, a comparatively larger scale of sellers of inputs (e.g. fertilisers) and larger buyers of agricultural products, etc. As a consequence, farmers might engage in various degrees of joint activities such as joint planning of production, joint procurement of inputs, joint storage or distribution, and joint marketing and selling in order to reach a larger scale on the markets.
- While some joint activities can on balance bring benefits to both farmers and consumers, some joint activities by independent producers can create competition issues under the competition rules (i.e. Article 101 TFEU). This is in particular the case for joint selling and agreements on quantities sold to the market. Mere **joint selling/collective bargaining** without any accompanying joint activities to improve competitiveness and efficiencies is generally prohibited because it is neither efficient nor sustainable. Mere joint selling removes incentives to increase productivity (that includes quality and efficiency improvements); it can create scarcity of supply and destabilise markets; and it can also lead to excessive price increases. In addition, mere joint selling arrangements weaken the ability of European farmers to compete successfully on the market with imports. **Joint production planning** and more generally **agreements between producers on the quantities supplied to the market** – again, without any accompanying joint activities to improve competitiveness and efficiencies – can also have such negative consequences.

<sup>4</sup> Case C-671/15 *APVE*. It should be noted however that this case concerns the interpretation of the CMO regulation of 2007 and thus the situation before the entry into force of the CMO of 2013.

- CAP derogations and block exemptions under competition law address essentially these two types of joint activities (joint selling and agreements on quantities) and set out conditions under which they may be carried out<sup>5</sup>.

## 2. *Derogations and exemptions*

- As stated above the EU legislator has decided that competition rules under the TFEU apply in principle to the agricultural sector. The CMO Regulation states that Articles 101 to 106 TFEU apply to all agreements, decisions and practices relating to the production and trade in agricultural products "save as otherwise provided in that regulation"<sup>6</sup>.
- This last expression means that a number of derogations may be contained in the CMO Regulation itself<sup>7</sup>.
- The application of competition rules under the TFEU means further that certain agreements, decisions or practices that may be considered to be prohibited by Article 101 TFEU may in turn be exempted from that prohibition by certain block exemptions or as a consequence of an individual exemption under competition rules under the TFEU.

### 2.1. *General derogations and exemptions*

- One **general CAP derogation**<sup>8</sup> allows joint activities by agricultural producers provided that 1- there is no obligation to charge an identical price, 2- there is no exclusion of competition and 3- this does not jeopardise CAP objectives. Competition enforcement and case law has not applied this general CAP derogation in practice so far. It is therefore difficult to know precisely its scope. 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. It appears to authorise joint production planning under certain circumstances (e.g. by a number of producers who represent a limited part of the market and thus have limited impact on the market).
- Another general CAP derogation allows certain agreements and concerted practices of recognised interbranch organisations (**IBOs**)<sup>9</sup> regrouping producers and other levels in the supply chain: for instance it allows under certain conditions a dialogue between actors in the supply chain on certain topics, the promotion of best practices and some market transparency. This can facilitate the adjustment of supply to market requirements. Those agreements and concerted practices must be notified to the Commission<sup>10</sup>. Also, that CAP derogation is not relevant for joint sales or agreements on quantities and must not entail the fixing of prices and quotas.

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<sup>5</sup> Individual agreements, decisions or concerted practices may be exempted under Article 101(3) TFEU as will be mentioned below.

<sup>6</sup> Article 206 of the CMO Regulation.

<sup>7</sup> Articles 207 to 210 of the CMO Regulation.

<sup>8</sup> Article 209 of the CMO Regulation.

<sup>9</sup> Article 210 of the CMO Regulation.

<sup>10</sup> Article 210(2) of the CMO Regulation.

- One **exemption under general competition rules** allows agreements on quantities and joint sales by agricultural producers in all sectors provided they ultimately jointly sell processed agricultural products that they have processed jointly. In practice the so-called Specialisation Block Exemption Regulation (SBER)<sup>11</sup> exempts the joint planning of production quantities, the joint collection of raw agricultural products, the joint processing of those products and the joint sales of the resulting processed products covering up to 20% of the relevant market for processed products. The markets for wholesale sale of processed food products are usually national in the EU. Therefore, this exemption usually allows agreements on quantities and joint sales of processed products up to 20% of the national market for processed products. This is relevant for many cooperatives in most agricultural sectors as will be explained below.

## ***2.2. Product specific CAP derogations***

- In the **dairy** sector, for raw milk, the CMO Regulation allows joint sales by agricultural producers so long as the overall coverage does not exceed 33% of the total national and 3.5% of the total EU production.
- In addition, for independent producers of cheese protected by a given EU appellation there is the possibility to agree on production and sale quantities<sup>12</sup>.
- In the three sectors of **olive oil, beef-and veal, arable crops**<sup>13</sup>, joint sales and agreements on quantities are allowed provided that 1- producers integrate in producer organisations, 2- these producer organisations carry out activities other than joint-selling that creates efficiencies<sup>14</sup> (such as joint procurement, joint distribution, joint storage, etc.) and 3- the sales of the producer organisations do not exceed the following thresholds:
  - 20% of the relevant market for olive oil;
  - 15% of the national production for live animals in the beef and veal sector;
  - 15% of the national production for arable crops.
- In the **ham** sector, independent producers protected by a given EU appellation can agree on production and sale quantities, subject to prior approval by the Member State<sup>15</sup>.
- In the **fruit and vegetables** sector, the CMO Regulation provides for joint planning of production and the withdrawal of products as well as green harvesting and non-harvesting under certain conditions for crisis prevention and management<sup>16</sup>.

<sup>11</sup> Article 2 of 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.

<sup>12</sup> Articles 149 and 150 of the CMO Regulation.

<sup>13</sup> Articles 169-171 of the CMO Regulation. The derogation does not cover some products from the beef and veal sector: these are live animals for fattening as the derogation applies only to the sales of animals for slaughter. The derogation does not cover some products from the arable crops sector: e.g. buckwheat, malting barley or sweetcorn.

<sup>14</sup> For more details about the scope of the activities required to benefit from these three sector-specific derogations please consult the guidelines published about these derogations (2015/C 431/01) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2015:431:FULL>.

<sup>15</sup> Article 172 of the CMO Regulation.

- In the **sugar** sector, until September 2017 (end of the quota system), the CMO Regulation also allows joint sales by beet growers of beet to sugar processors (quantities are set by regulation under a quota system). From 1 October 2017, the CMO Regulation will allow agreements between beet growers and sugar processors on certain price formula elements<sup>17</sup>.
- In the **wine** sector, the CMO Regulation allows agreements to limit output in the form of marketing rules to improve and stabilise the operation of the common market in wines provided that State regulation makes these agreements mandatory<sup>18</sup>.

### ***2.3. Individual exemptions under individual assessment***

- Agreements reached between independent producers on quantities and sales can be exempted from competition rules under the general provision of Article 101(3) TFEU. Such agreements need to create efficiencies (e.g. in terms of distribution of the product), they need to be indispensable to create the efficiencies, they should not eliminate competition and these agreements need to allow consumers a fair share of the resulting benefits. This assessment is relevant for situations that are not covered by any of the derogations and exemptions presented above and can result in an "individual exemption" for a given set of agreements in a given market situation.

## **3. *Situation by sector***

- The following paragraphs analyse the situation under competition law of agreements between independent producers on joint sales and on quantities in most agricultural sectors.
- In the **dairy** sector, most agreements between independent producers take place within cooperatives. Cooperatives represent on average in the EU more than 55% of milk output and in 10 Member States more than 70%. Most cooperatives are collecting and processing the milk delivered by their members and represent less than 20% of the national market for processed dairy products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales. Other cooperatives and some producer organisations merely carry out joint sales: under the specific CAP derogation for this sector their agreements on prices are allowed in so far as the quantities covered do not exceed 33% of the total national production and 3.5% of the total EU production (this is the case for virtually all of them in practice). Finally, independent producers of cheese protected by a given EU appellation may agree on production and sale quantities and have effectively done so for some appellations (e.g. Comté and Beaufort in France).
- In the **beef and veal** sector, most agreements between independent producers take place within producer organisations selling live animals and within cooperatives slaughtering and/or

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<sup>16</sup> Article 33 of the CMO Regulation.

<sup>17</sup> Article 125 of the CMO Regulation and other provisions, also Commission Delegated Regulation of 17 May 2016 amending Annex X to Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards purchase terms for beet in the sugar sector as from 1 October 2017, C(2016) 2783 final.

<sup>18</sup> Article 167 of the CMO Regulation.

processing carcasses. Cooperatives slaughtering and/or processing carcasses rarely exceed (and are usually far below) 20% of the national wholesale market for beef/veal meat products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales. Producer organisations selling live animals usually carry out other efficiency-enhancing activities (procurement of inputs, transport, etc.) and they represent (usually far) less than 15% of the national production (of the sale of live animals): the specific CAP derogation for this sector thus covers agreements reached within these producer organisations and with their buyers on quantities and sales. The other producer organisations that merely carrying out joint sales need to be assessed on an individual basis.

- In the **pig** sector, most agreements between independent producers take place within cooperatives. The share of cooperatives on average in the EU is slightly more than 25% and varies significantly between Member States. While in some Member States more than 80% of farmers are organised in cooperatives, in other Member States there are no cooperatives. There are several types of cooperatives as well as some other producer organisations. A first type of cooperatives collects the animals, slaughters and processes them into meat products. These cooperatives rarely exceed (and are usually far below) 20% of the national wholesale market for pig meat products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales. A second type (of usually smaller) cooperatives as well as some other producer organisations only engage in joint selling of live animals and some other producer organisations do the same: such mere joint sales need to be assessed on an individual basis.
- In the **sheep** sector, there are reportedly few agreements between independent producers and they take place within cooperatives. There are few cooperatives (representing less than 5% of total supply in the EU overall) and they are usually located in remote regions where they coordinate the distribution and marketing of the products. Their joint sales need to be assessed on an individual basis.
- In the **wine** sector, most agreements between independent producers take place within cooperatives. Wine cooperatives represent a bit more than 40% of the production of wine in the EU, and more than 50% in some Member States. Wine cooperatives collect grapes from their members and they produce wine which is sold either bottled or in bulk. Virtually all existing cooperatives represent (usually far) less than 20% of the national market for the wholesale sales of wine: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales. In addition, producers may reach agreements to limit output in the form of marketing rules to improve and stabilise the operation of the common market in wines provided that these agreements are made mandatory by State regulation.
- In the **olive** sector, most agreements between independent producers take place within cooperatives. Cooperatives represent more than a third of the output overall in the EU. Cooperatives usually process olives to produce olive oil or table olives and thus benefit from the SBER. There are cooperatives that do not process the olives into olive oil themselves but whose members ultimately produce olives for the purpose of olive oil; these cooperatives usually provide efficiency-enhancing services to their members (such as procuring farm supplies and transport and distribution services); the specific CAP derogation for this sector thus covers agreements reached within these organisations and with their buyers on quantities and sales up to 20% of the relevant market. Finally, there are cooperatives that only market table olives: their sales need to be assessed on an individual basis.
- In the **fruit and vegetables** sector, most agreements between independent producers take place within cooperatives. Cooperatives represent more than 40% of the output overall in the EU and

in four Member States<sup>19</sup> about 70% or more of the output. Most cooperatives essentially collect and market fruit and vegetables without processing them. Joint planning of production and the withdrawal of products done for crisis prevention and management can benefit from the derogation specific to the sector. Other activities of these cooperatives need to be assessed on an individual basis. Some of these activities may actually not infringe Article 101(1) TFEU in the first place: this can be the case for instance if they simply organise a market place where prices are set through independent mechanisms (e.g. an auction). Some of these activities may infringe Article 101(1) TFEU and need to be assessed on an individual basis under Article 101(3) TFEU. Finally, a few cooperatives are engaged in processing. These processing cooperatives represent (usually far) less than 20% of the national wholesale market for fruit- or vegetables-processed products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales of processed products.

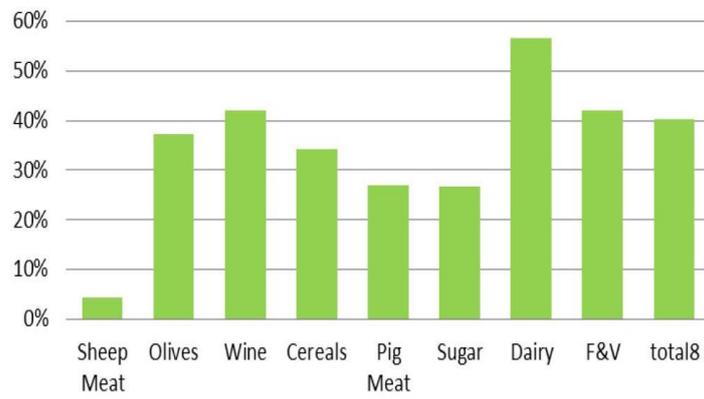
- In the **sugar** sector, agreements between independent beet producers usually take place either within cooperatives processing beets into sugar or between beet producer organisations and processors. Virtually all beet supply in Europe is covered by these agreements (so called "agreements within the trade"). CAP specific derogations cover these agreements by until September 2017. After September 2017, CAP specific derogations will cover only some price formula elements. Apart from these price formula elements from 1 October 2017, agreements concluded both through cooperatives and by producer organisations with processors need to be assessed on an individual basis<sup>20</sup>.
- In the **cereals and other arable crops** sector, most agreements between independent producers take place within cooperatives. Cooperatives represent about a third of the EU output. Most cereals cooperatives collect and sell the output of their members. Most cooperatives also carry out other efficiency-enhancing activities (e.g. transport, storage, distribution, procurement of inputs etc.) and they represent (usually far) less than 15% of the national production of the product concerned: the specific CAP derogation for this sector thus covers agreements reached within these cooperatives and with their buyers on quantities and sales. Other cooperatives and producer organisations merely carrying out joint sales need to be assessed on an individual basis. Some cooperatives are engaged in the processing of arable crops (e.g. milling, animal feed production). In most cases, these processing cooperatives represent (usually far) less than 20% of the national wholesale market for processed products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales of processed products.
- In **other sectors** (e.g. eggs, poultry), agreements between independent producers take place within producer organisations. If these producer organisations carry out mere joint sales, their agreements need to be assessed on an individual basis. Producer organisations that carry out processing represent (usually far) less than 20% of the national wholesale market for processed products: the SBER thus exempts agreements reached within these cooperatives and with their buyers on quantities and sales of processed products.

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<sup>19</sup> The Netherlands, Belgium, Denmark and Slovenia.

<sup>20</sup> Unlike in other sectors, for most processing cooperatives in the sugar sector, agreements concluded through these processing cooperatives may not benefit from the SBER because most sugar processing cooperatives represent more than 20% of the national market for wholesale supply of sugar.

### Market share of cooperatives, total EU, per sector, 2010



*Source: 2012 Report "Support for farmers' cooperatives"*