



COMMITTEE ON AGRICULTURE AND RURAL DEVELOPMENT

Contribution in view of the public consultation on the Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors

The Committee on Agriculture and Rural Development of the European Parliament (AGRI) asks the Commission to take into account the following comments when finalising the guidelines:

A) General comments

1. Background: The EU food supply chain

The food supply chain plays a substantial role in the European economy, connecting sectors – agricultural, food processing industry and distribution. These sectors have a direct impact on all European citizens, since food represents on average 16% of households' expenditure.

TABLE 1. KEY FACTS OF THE FOOD SUPPLY CHAIN

DISTRIBUTION & SERVICES	FOOD AND DRINK INDUSTRY	PRIMARY SECTOR	Agri cooperatives
% Value Added of Food Chain (1) 2011 51% 2005 43% 1995 38%	% Value Added of Food Chain (1) 2011 28% 2005 33% 1995 31%	% Value Added of Food Chain (1) 2011 21% 2005 24% 1995 31%	General data (2) 21,769 cooperatives 6 172 746 members ≈ 700,000 employees Turnover € 347 billion
Concentration of European food market share (3) 10 retailers control 40% of the EU food market	General data (4) Number of companies: 286,000 Turnover: 1,048 billion Employment: 4,2 million people	Holdings (5) EU 28: 12.2 million of holdings EU 15: 5.2 million EU 13: 7.0 million	Top 10 EU Agri-cooperatives (all included) (2) (*) Turnover: €84,8 billion (2013)
Concentration of national food market shares (3)	SMEs (≤ 250 employees) (4) 99.1% (283,000 companies) 48.8% of Value Added (€99 billion) 64.3% of employees (2.9 million)	Employment in agriculture (5) 9.8 million people	Top 10 Meat cooperatives (2) Turnover: €29,1 billion (2013)
Country Number of Major sup. % Food market	Micro-companies (≤ 10 employees) (4) 78.8% (225,000 companies) 8.9% of Value Added 16.9% of employees	Physical Size (5) 69.3% ≤ 5 Ha 24,8% between 5 – 50 Ha 5,9% ≥ 50 Ha	Top 10 cereals supply cooperatives (2) Turnover: €11,4 billion (2013)
PT (2011) 3 90%	Top 9 Euro-companies (incl. coop) (**) World turnover (2014): €234.7 billion World employees: 867,500 people	Economic size (5) 9% ≥ €50,000 (SO peer farm) 58.5% ≤ €4,000 (SO per farm)	Top 10 olive oil cooperatives (2) Turnover: €0,9 billion (2013)
FI (2011) 3 88%			
DE (2011) 4 85%			
A (2009) 3 82%			
DK (2009) 5 80%			
UK (2011) 4 76%			
BE (2011) 5 71%			
ES (2009) 5 70%			
FR (2009) 5 65%			
NL (2010) 5 65%			

Sources: European Parliament - Policy Department B based on data from: (1) European Commission (2015), 'Parliamentary Questions, Question for written answer to the Commission (E-000251/15 of 15.1.2015) on the Food Supply Chain' and answer of 25.2.; (2) COGECA (2015), 'Development of Agricultural Cooperatives in Europe, 2014'; (3) Consumers International (2012), 'The relationship between supermarkets and suppliers: What are the implications for consumers?'; (4) Food Drink Europe (2014), 'Data and Trends of the European Food and Drink Industry 2013-2014'; (5) European Commission (2014), 'CAP context indicators, 2014 update';

(*) 2013 data from Top 10 EU Agri-cooperatives: Bay Wa (DE); Firesland Campina (NL); Arla Foods (DK); DLG (DK), Danish Crown (DK), Agravis (DE), Vion Food (NL), In Vivo (FR), Kerry Group (IE) and DMK (DE).

(**) 2014 world data from Top 9 Food and Drink companies: Nestlé (CH), Unilever (UK-NL), Danone (FR), Associated British Food (UK), Lactalis (FR), Friesland Campina (NL), Oetker Group (DE), Ferrero (IT) and VION (NL).

The EC Communication '*A better functioning food supply chain in Europe*' (COM (2009) 591) identified significant tensions in contractual relations between actors of the food supply chain, stemming from the diversity of actors in the chain and their differences in bargaining power.

According to the Commission's answer to a recent Parliamentary Question (E-000521/2015), the value added for agriculture in the food chain dropped from 31% in 1995 to 21% in 2011, versus a value added of around 28% for the food industry and of 51% for food retail and food services taken together (Table 1)

This data is evidence that farmers' share of revenues is being inexorably squeezed due to an imbalance of power between producers and retailers and other layers of the food supply chain.

In fact, only 10 large retailers/supermarkets now control 40% of the European food market. In most Member States, 3-5 large retailers hold over 65% of the market share (Table 1).

Despite some major Euro-companies, the EU food and drink industry is very fragmented: 283,000 companies are SME's (99,1% of total), including 225,000 micro-companies (with less than 10 employee's) (78.8% of total).

In this context, the majority of the current 12.2 million agricultural holdings are small units (Table 1). Faced with increasing levels of consolidation in the retail sector as well as in the food and drink industry, farmers tend to strengthen their position through mergers, acquisitions, cooperatives and/or cooperation agreements. There exist 21,769 cooperative companies in the EU. However the level of cooperation is very different depending on the countries and sectors. Furthermore, the majority of these cooperatives are small companies (Table 1).

In the face of ever greater concentration of demand inside the food supply chain, the grouping of agricultural supply through producer organisations (PO's) and cooperatives is more than ever an economic necessity in order to strengthen the position of producers in the market.

2. Approach to be followed in the guidelines

One of the key element of Regulation 1308/2013 (CMO Regulation) is to recognise the "*useful role*" that producer organisations (PO's) and their associations can play 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*" (Recital 131).

Furthermore, Recital 172 specifies that "*in view of the specific characteristics of the agricultural sector and its reliance on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated, special attention should be paid to the application of the competition rules laid down in Article 42 TFEU. To that end, there is a need for close cooperation between the Commission and the competition authorities of Member States. Moreover, guidelines adopted, where appropriate, by the Commission are a suitable instrument to provide guidance to undertakings and other stakeholders concerned*".

In other words, existing concentration levels in the food chain justify the need for distinct rules for agricultural producers and for other operators.

Moreover, the regulation specifies that competition rules apply to agricultural agreements *“provided that their application does not jeopardise the attainment of the objectives of the CAP”* (Recital 173). It also makes clear that a derogation to competition rules apply to decision and practices by PO's which are necessary for attaining the CAP objectives as outlined under Article 39 TFEU (Recital 174 and Article 209). Article 209 further specifies that *“Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 152 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, unless the objectives of Article 39 TFEU are jeopardised”*.

The Committee considers that the interpretation of such basic principles should be the starting point of any guidelines on the implementation of competition rules in the agriculture sector. In particular, point (13) of the draft guidelines is misleading at it seems to make a general principle that competition rules apply to agreements between producers via their producers organisations whereas this is in contradiction with Article 209 of the CMO Regulation.

3. Scope of the draft guidelines

The intention of the legislator when requesting Commission guidelines under Recital 172 and Article 206 of Regulation 1308/2013 was not to limit the scope of such guidelines to the new sectors covered by contractual negotiations (ie. olive oil, beef and veal, and arable crops). The intention was to have general guidelines for the application of competition rules to all agricultural sectors and which should among other issues, clarify the scope of derogations and clarify the interpretation of key concepts in order to ensure a uniform implementation and a level-playing field among farmers and producer organisations across the internal market. Key concepts for which an interpretation is necessary include for example the definitions of *"the relevant market"* (Article 207), of *"dominant position"* (Article 208) and of *"agreements [...] by which competition is excluded"* (Article 209) for which relevant examples based on case-law and the outline of sector specific approaches where necessary would be extremely useful.

In this regard, the AGRI Committee refers the Commission back to the European Parliament mandate for the negotiation on the CMO Regulation and in particular Articles 143, 143a, 143b and 144 of this mandate and requests the Commission to draw up further guidelines in this direction.

Moreover, the Committee is of the opinion that the guidelines under consultation should specify why olive oil, beef and veal, and arable crops have been selected in priority by the Commission and whether and to which extent they could have implications on future guidelines in other sectors such as fruit and vegetables and milk, other agricultural sectors in general and/or inter-branch organisations.

4. Operational usefulness of the guidelines

The Committee is furthermore of the opinion that the draft guidelines as currently drafted do not sufficiently clarify the border between cases subject to existing competition rules and cases subject to the new rules introduced by the new CMO regulation. It is in the interest of farmers and their organisations to have more practical information regarding how to set up and organise a PO in line with Articles 169-171.

Furthermore, most examples shown in the guidelines are deliberately focused on forbidden practices (negative examples such as clear dominant positions or price agreements) whereas producers and their organisations need first and foremost positive examples specifying which practices are allowed under which conditions (for example with an indication of the maximum market shares allowed). Additional flow charts (following the template mentioned in page 14 of drafting guidelines) providing guidance to stakeholders concerned would be most welcome.

Furthermore, the examples provided for under point (75) of the draft guidelines are vague and basically repeat what is provided for under Articles 169-171 instead of giving more specific and practical examples of allowed practices.

More generally, the draft guidelines do not appear to be very user-friendly and in line with the Commission's commitment as regards the simplification of the CAP.

5. Legal certainty

The guidelines need to be more specific, indicating in particular whether Article 101(3) TFEU applies to the three sectors covered by the guidelines without prejudice to the specific CMO exemptions. Furthermore, guidelines have to provide more information on the relationship between Articles 152 and 169-171 and between Articles 169-171 and Articles 33, 148-149 and 157-158 of the CMO regulation. It would also be useful to mention the '*effet utile*' of competition law.

For example, further analysis could be developed on:

a) Article 101 (3) vs Articles 169, 170 and 171 of CMO

It is not without significance that: 1) the conditions of efficiency required in Articles 169, 170 and 171 CMO for the implementation of contractual negotiations are different from those provided in Article 101 (3) CMO; 2) interventions by the competition authorities under Articles 169 (5), 170 (5) and 171 (5) refer only to specific individual and separate circumstances if the CAP objectives (Article 39 TFEU) are jeopardised. In this context, the fundamental parameters of assessment to be applied in these cases would be those from Article 39 TFEU and not those of competition law.

b) Article 209 vs Article 152

Article 209's reference to the recognised producer organisations under Article 152 shows that the activity exercised by law by these structures is in line with the competition rules (subject to the limitations provided for in Article 209).

c) Article 206 vs Articles 169, 170 and 171

A decisive point to be highlighted concerns the legal basis of the guidelines: in principle, the basis underpinning the draft communication concerning Articles 169, 170 and 171 cannot be identified in Article 206, third subparagraph.

6. Implementation of the guidelines

How the Commission intends to make sure that Commission rules are properly implemented across the Member States given that point (2) of the draft guidelines indicate that these guidelines "are not legally binding on the Member States"?

B) Specific issues

1 Relevant market / national production

As outlined above, the intention of the legislator was that the guidelines clarify key concept such as the relevant market in relation to the national market as this question is key for assessing whether the volume negotiated by POs exceeds the maximum permissible threshold. In Articles 169 – 171 CMO the volume of production that can be negotiated by the PO is capped at a certain percentage. However, the yardstick in Article 169 (olive oil) differs from those in Articles 170 and 171. Indeed, while Article 169 mentions a threshold in relation to the 'relevant market', Articles 170 and 171 refer only to 'the total national production'. In addition, Article 169(2)c seems to establish a link between 'national production' and 'relevant market' which cannot be found in Articles 170 and 171. It seems therefore that such issues would need further clarification in the guidelines.

2. Relevant market / products' definition / products from non-members of PO's.

The draft guidelines do not define products concerned by contractual negotiations in the olive oil, beef and veal livestock and/or arable crops sectors whereas this is a key point for determining the 'relevant market' for each product concerned by Articles 169-171. Furthermore, the wording of Articles 169-171 CMO do not explicitly specify that POs may negotiate production from non-members. However, the guidelines cannot ignore the existence of situations under which the production from non-members may be considered (while respecting the threshold) in order to comply with the CMO's objectives which are to strengthen POs' bargaining powers as well as to generate significant efficiencies.

3 Significant efficiency test

The new CMO Regulation provides for possible contractual negotiations in the sectors of olive oil, beef and veal and arable crops without any further assessment. However, the legislator conditions the authorisation of joint negotiations by producers to the creation of significant efficiencies through a list of joint activities. In theory, 'significant efficiencies' could be assessed in terms of cost and volume of the activity concerned. In reality, this exercise is not that simple as 'relevant costs' that the producers should take into account need to be considered and therefore defined. Also, joint activities such as harvesting planning or production planning would generate significant efficiencies but it could be difficult to quantify them in economic terms. Furthermore, as mentioned above, more information is needed on the conditions applicable to the production from non-members.

Moreover, point (59) of the draft guidelines makes cumulative the objectives of optimising production costs, concentrating supply and placing of the market of the products produced by a PO's members in contradiction with Articles 169-171 of the CMO Regulation which only state that POs in the olive oil, beef and veal and arable crops should pursue "one or more" of these three objectives in order to negotiate contracts on behalf of its members.

4. Terminology: 'contractual negotiations' vs 'joint selling'

The draft guidelines contain many references to 'joint sales' or 'joint selling' instead of the formulation used in Articles 169-171 and which refers to 'contractual negotiations'. This wording seems restrictive in relation to the extensive list of joint activities referred to in Articles 169-171. The Committee considers that the correct formulation of the regulation (i.e. "contractual negotiations") should be used throughout the guidelines, outlining where necessary specific aspects applying to joint selling or other activities, with a view to avoiding any confusion as regards the scope of the derogations applying to agricultural activities.

In addition, the term '*contractual negotiations*' was already used for the 2012 milk package (now Articles 148 and 149 of the CMO Regulation).

5. Rules applicable to cooperatives

Regulation (EU) No 1308/2013 only makes reference to "*cooperatives*" in relation to operators in the dairy and sugar sector. The use of the term cooperatives instead of producer organisations in several parts of the guidelines can therefore be misleading.

Furthermore competition rules can apply in principle to cooperatives. However, some pro-competitive effects can be also recognised under certain conditions as provided for by relevant case-law. But surprisingly point (13) of the draft guidelines states that "competition rules apply not only to the agreements between individual producers (e.g. the creation of a PO and its founding statutes), but also to the decisions made/contracts concluded by the PO". This makes the guidelines confusing in relation to the cooperative framework. It should be clarified that cooperative recognised as producer organisations benefit from the agricultural exception applying to PO's.