

COPA AND COGECA'S CONTRIBUTION TO THE DRAFT GUIDELINES ON JOINT SELLING OF OLIVE OIL, BEEF AND VEAL LIVESTOCK AND ARABLE CROPS

BACKGROUND

The new CAP rules on cooperation between producers in the sectors of olive oil, beef and veal and arable crops set a new standard for allowing joint selling by producers which is different from the one applied under general competition law.

Joint selling (including fixing prices together) is prohibited by standard competition rules (Article 101 TFEU) unless the conditions of Article 101(3) TFEU are met.

In January 2015 the EU Commission has launched a public consultation on new draft guidelines on the application of EU antitrust rules in the agricultural sector.

The guidelines has indeed the scope to ensure that the implementation of the CAP reform improves the functioning of the food supply chain and safeguards effective competition and innovation on the markets for agricultural products. It is fundamental to create the right conditions for the agricultural sector to become more competitive and innovative. In particular, this implies encouraging cooperation between farmers while ensuring competition in the sector. The purpose has to be the encouragement of producer cooperation to address imbalances in the food chain in order to enhanced role of Producer Organisations and Associations of POs.

Indeed according to Article 206 of the CMO Regulation Articles 101 and 102 TFEU apply to agreements, decisions and practices concerning trading in agricultural products "save as otherwise provided in this Regulation". By setting specific rules for agreements, decisions and practices of producers of agricultural products in certain sectors, articles 169-171 CMO are the derogation for joint selling by POs in three sectors ("safe harbour").

Specifically, articles 169, 170 and 171 of the CMO Regulation, allow joint supply activities, i.e. joint sales and sales-related activities of agricultural products in the sectors of olive oil, beef and veal, and arable crops by producers of these agricultural products through POs.

The purpose of the derogation is to strengthen the bargaining power of producers in the sectors concerned in order to ensure a fair standard of living for the producers and a viable development of production. In this sense POs would typically negotiate all elements of supply contracts such as price, volume, quality, duration and other (e.g. termination, payment, delivery, force majeure).

The derogation created by Articles 169-171 of the CMO Regulation is subject to a number of conditions regarding:

- ✓ The recognition of the PO/APO
- ✓ The objectives of the PO
- ✓ A Significant Efficiency Test

- ✓ The relations between the PO and its members
- ✓ A cap on the product quantities subject to contractual negotiations
- ✓ Notification obligations

GENERAL REMARKS

Copa-Cogeca welcomes the draft Guidelines on joint selling of olive oil, beef and veal livestock and arable crops.

The purpose to give farmers more clarification and practical information is considered almost reached but as there is no heterogeneity across the EU the differences in the concerned sectors have to be considered.

A better bargaining power of producers is necessary. It still not clear how much competent authorities can intervene in defining the product market as well as interfere in lowering the limits (15% or 20%).

In that context it must be clearly stated that the size of the PO or APO in question can exceed the limits established in these articles (15% for the beefmeat and cereals sectors, and 20% for the olive oil sector), and that these limits are only applied to the contractual negotiations which these articles refer to.

In addition, in accordance with Article 206, the Commission should propose draft guidelines on the application of all derogations from the competition rules laid down in the CMO, in particular those in Article 209. This article mentions that derogations from competition law cannot be granted to "agreements [...] by which competition is excluded", whereas at the same time the CMO confers POs with the mission of "ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity". These different concepts should therefore be clarified in order to give POs the necessary means to respond to the objectives that the regulation lays down.

There is a highly need to strengthen the position of farmers in the food supply chain considering the fact that production of olive oil beef and crops, being highly fragmented.

COMMENTS ON THE COMMISSION COMMUNICATION REGARDING GUIDELINES ON THE APPLICATION OF THE SPECIFIC RULES SET OUT IN ART. 170 (CONTRACTUAL NEGOTIATIONS IN THE BEEF AND VEAL SECTOR)

The reform of the CAP has introduced the contractual negotiations by producer organisations in several sectors, including the beef and veal sector in order to increase the bargaining power of producers, while preliminary integrating activities thus creating significant efficiencies. These rules should take account of the existence and role of cooperatives in the organisation of the sector.

In the beef and veal sector, there is no heterogeneity across the EU when it comes to POs, including cooperatives, the degree of their development differing greatly. In addition, they are of smaller size and concentration than the private processing companies. In several countries, processors have more than 50% of the market share, therefore a better bargaining power of producers is necessary.

Art. 170 foresees the possibility for producer organisations to collectively negotiate contract terms on behalf of their members for the supply of live cattle under certain conditions. The European

Commission has worked on guidelines about potential competition law issues arising from the implementation of these new rules.

Specific comments on the text of the guidelines for the beef and veal sector:

Examples of the application of the derogation:

Article 170 refers to the possibility by a PO to collectively negotiate contract terms for the supply of live cattle aged less than 12 months and aged from 12 months and older. In paragraph 110, an example where “the derogation” (the provisions of article 170) is applicable, is provided. Jointly selling by recognised POs of cattle production of its members for the supply of live cattle for slaughter should not be applicable exclusively for “live cattle for slaughter”. Contractual negotiations for animals sold for fattening should also be regarded as eligible.

Relevant market:

The relevant market has to be the live cattle aged less than 12 months and aged from 12 months and older market and interpreted as in the basic act and not a reduced/segmented market left at the latitude of the member state.

Application of the Significant Efficiency Test:

There are several activities which could be conducted by the PO (with the obligation of conducting at least one) in order to generate significant efficiencies.

The negotiation could take place provided that the activities conducted by the POs are “significant in terms of quantity of beef and veal concerned”. This is regarded in the same example as more than half of the volumes commercialised for each activity. The activities conducted by the POs have to be taken together in order to evaluate if they are « significant » as provided in the basic act. In addition, there is a need to be able to simply calculate the significant level, based on measurable criteria such as the number of members of the OP involved in the activity.

The significant efficiency test is done using as a reference the “majority of the livestock commercialised by the PO”. However, “volumes” is sometimes used with reference to beef products, feed or waste.

Joint promotion: Generic promotion implies an important investment for the promotion strategy and activities (organising fairs, tasting, brochures...). In addition to this, the contribution of this activity to avoiding a decline in consumption and consequently production (which contributes to one of the CAP objectives) has to be also considered. Thus, generic promotion can also generate significant efficiencies and has to be included as eligible activity.

Joint organising of quality control: reference is either made to products or live cattle. It is not clear if when referring to products produced, one should understand live cattle.

Joint use of equipment: significant efficiency is achieved when a PO carries out the necessary investment in equipment. An example is provided in the guidelines, e.g. machinery for producing feed.

It is considered that the costs of using the equipment are significant when significant volumes commercialised by the PO are produced with the help of jointly owned equipment. It can be interpreted that “significant volumes commercialised” (cattle) should have been fed with feed produced with jointly owned equipment. In the beef and veal sector, feed is produced both on-farm and bought from the market. Therefore it could be possible that in the second situation, this derogation would not be applied, which disregards the specificity of the sector. This provision should be made clearer in order to avoid a potential interpretation that only beef produced with feed produced with jointly owned equipment can generate significant efficiencies.

In addition, this should not be seen as an exclusive type of equipment.

Joint use of storage (feed): It is stated that “initial and other investments in storage entail significant costs if they concern significant volumes... In case the storage activities cover the majority of the livestock commercialised by the PO and are thus significant in terms of volumes, the PO is likely to generate significant efficiencies”. In the first case, significant volumes refer to feed while in the second to beef. There is an incoherence in the approach.

Joint procurement of inputs: it can be interpreted that the majority of livestock have to be produced only with the feed purchased or other inputs. This should not be exclusive.

Joint management of waste: it is not “the majority of waste produced by the livestock commercialised by the PO” but the “waste produced by the majority of livestock commercialised by the PO” in order to be consistent with the rest of the activities and in line with the basic act.

In addition to these activities, there are others who may be regarded as generating a high efficiency as the management of IT tools, the payment guarantee, the technical and economic support for livestock production.

CONTRIBUTION TO THE GUIDELINES RELATING TO ARTICLE 169 ON CONTRACTUAL NEGOTIATIONS IN THE OLIVE OIL SECTOR

The olive oil sector encourages the adoption of measures which respond to the need to concentrate the sector, with the aim of rebalancing the food chain.

Production of olive oil, being highly fragmented¹, is unable to negotiate on an equal footing and under the same conditions as industry and retail. For this reason, there is a need to strengthen the position of farmers in the food supply chain.

The aim of Article 169 of Regulation 1308/2013 is to strengthen producers' bargaining power in the olive oil sector vis-à-vis downstream operators in order to guarantee fair living conditions for producers and viable development of production. The guidelines provide criteria which POs and APOs must comply with.

The olive oil sector therefore welcomes the opportunities available under Article 169 of Regulation 1308/2013. Besides, the drafting of guidelines concerning Article 169 will make it possible to have uniform application of the derogations from EU anti-trust law in all Member States. Nevertheless, the application of this new article must make it possible to achieve the objective of re-balancing the food chain.

Recognition of the PO

Recognition of the PO is carried out by the Member State under Article 152 of Regulation 1308/2008. Yet, in accordance with Article 159, this recognition is mandatory, unlike the other sectors, which favours the creation of a PO. As regards APOs, recognitions of these organisations must take place in accordance with Article 156, and this recognition by the Member State is voluntary.

In the olive oil sector, the level of organisation among producers differs greatly from one Member State to the next, ranging from 5% in Italy to 70% in Spain. In addition, these POs are often too small when faced with the highly concentrated industry and retail chains.² That is why, as is

¹ For instance, according to data from 2013, in Greece the olive oil sector accounted for 840,000 ha, 360,000 producers, 2,100 mills, 20 brokers and 250 packagers. Italy is home to 775,000 olive producers, of which 10,000 are table olive producers, and around 5,500 mills. In France there are 25,000 producers, compared to 250 mills and 30 brokers. In Spain, 5 companies absorb 60% of purchases, compared to approximately 1700 crushing mills and a large number of farmers selling their products directly.

² Economic analysis of the olive sector, European Commission, Directorate General for Agriculture and Rural Development, July 2012

stated in the Commission's action plan for the olive oil sector, as a precondition it is necessary to increase the size of POs in order to strengthen producer organisations' bargaining power within the food chain. Encouraging the creation of APOs is also a step in this direction.

Objectives of the PO

As is stated in the guidelines, Article 169 requires POs or APOs to concentrate supply effectively, to place products on the market and to optimise production costs. Therefore, the three objectives identified in §1 Article 169 must be met.

As regards the objective to market the oil of the OP or APO's members, cases where the PO might have to resort to buying olive oil from non-members of the PO should be considered, all the while guaranteeing that this simply remains an ancillary activity to the marketing of its members' oil. Indeed, because of variations in olive oil production due mostly to weather conditions, it is important to not exclude situations where this kind of purchasing applies to more than 25% of production subject to contractual negotiations.

A test of substantial efficiency gains

According to Article 169, achieving these objectives must lead to an integration of activities which generate significant efficiencies, so that the activities of the PO or APO make a general contribution to fulfilling the objectives of the CAP. For this, the guidelines advocate taking an inventory of the PO or the APO's activities and evaluating the level of the volumes and costs covered by these activities. It must be noted that the definition of "significant" efficiencies is not included in Article 169. The guidelines actually refer to an activity covering the majority of the olive oil marketed by the PO or APO. Nevertheless, in certain cases, some activities might not cover the majority of the marketed oil, but could still generate significant efficiencies. In addition, we also need to analyse the possibility of a PO or APO carrying out several activities which together cover the majority of marketed olive oil, thereby generating significant efficiencies.

If the PO is a member of a "second-degree" PO, it is appropriate for the activities carried out by the first-degree PO which improve efficiency to be taken into account when measuring the efficiency gains of the second-degree PO as part of the derogation.

Besides this, it is important to note that because of the climate the olive oil sector has been subject to considerable variability in terms of its production. For instance, in the 2013/2014 marketing year, production amounted to 2.5 million tonnes, whereas in the 2012/2013 marketing year it was 1.5 million tonnes. The shared use of storage facilities can therefore cover significant volumes in some years with high costs, and in others years less. This is an important activity for the olive oil sector which generates significant efficiencies. As is stated in the guidelines, this activity enables sales to be postponed when the market situation is more favourable (and not necessarily when supply is highest at the moment of the harvest). This makes it possible to remedy unbalanced levels of supply created by the fluctuating amounts of olives harvested over several years. This action also makes it possible to stabilise the market by adapting supply to demand, and thus enabling regular supply to consumers. As a result, the assessment of the significant efficiencies gained must take place over a period of several years and not sporadically. It is therefore not appropriate to apply a limit to the percentage of the volume of marketed olive oil which must be covered by this activity.

As regards generic promotion, the new regulation on the promotion of agricultural products, 1144/2014, allows POs to apply for generic promotion programmes for olive oil. This activity causes considerable costs and volumes and may result in substantial efficiency gains in the olive oil sector. This should be taken into account in the guidelines.

A cap on the amounts of produce subject to contractual negotiations

Article 169 applies only if the volume of olive oil production subject to contractual negotiations does not exceed 20% of the relevant market, by distinguishing olive oil for human consumption from olive oil used for other purposes. The article does not define the relevant market, but the guidelines do provide some suggestions about determining it.

In particular, the guidelines identify three distinct markets, namely olive oil for the retail trade; olive oil for industrial clients; and olive oil for clients in the hotel and catering sector. We do not hold the view that this differentiation is adapted to the current sector. Olive oil for consumers must be considered as a single market. As part of this, it is important not to define the different markets for different types of olive oil (extra virgin, virgin, and other olive-based oils.) From a geographical point of view, it is also important for the relevant market to be situated at the level of the European Economic Area.

CONTRIBUTION TO THE GUIDELINES RELATING TO ARTICLE 171 ON CONTRACTUAL NEGOTIATIONS IN THE CEREALS AND OILSEED SECTOR

The cereals working party pinpointed in its contribution to the CAP reform post 2013 that in order to overcome the imbalance in contractual power and unfair contractual practice as well as to improve price distribution along the supply chain (farmers should not have to “endure prices”) and ensure farm businesses recover the value-added, it is essential to establish a direct link with consumers and reduce the number of middle-men and intermediaries. The future CAP must therefore provide instruments for supporting supply chains that are entirely managed by farmers. In this way, farmers would be recognised as producers of food as opposed to commodities. In this context, the Producer organisations represent a concentration of operators within the sector and ensure fluidity in the market, to a certain extent.

Main challenges in the grain sector

In the Cereals and oilseed sector, the market share of the agricultural cooperatives differs greatly from one Member State to the next, ranging from 5% to 75%. In addition, several POs are often too small when faced with the international trade companies which may operate on difference places in the international market.

The recent study developed by Copa-Cogeca and Rabobank has also identify a need in infrastructure and storage capacity in order to facilitate the flow of commodities through the single market. In certain regions of Europe, the limitation of storage capacity may be a good incentive to develop POs in order to ensure a good availability of supply.

Finally, the growing challenge for the grain sector is to manage better the cost of input such as fertilizer. Today, the inputs represent till 60% of the operating cost of the grain production. Few new production capacity and the development of the world players in the fertilizer market represent a strait to organize and develop the business of the grain producers.

Relevant market

The grain sector is one of the EU market sector open to worldwide competition. The recent development in price structure show that the EU price in cereals and oilseeds is directly link to the world price system. Therefore the concept of relevant market should be dealt with precaution. Furthermore, the flow of grains between Member States is very high, around 50% of the national production. With the recent development in oil price, the transport cost between countries should be compared to cost opportunities to import cereals or oilseed.

Due to the CAP reform, farmers need to keep diversity of crops on his farm. Therefore the PO would have to market most probably different arable crops for divers market.

Finally, in the feed sector, the availability of the feed compound industry to shift from one commodity to another commodity should be taken into account. The recent development on the price ratio corn/wheat has generated more use of corn and limit in that way the size of the relevant market for the POs. as the production of this PO is competing with another product.

Recognition of the POs:

Cooperatives are recognize at national level by the Minister of agriculture in a large majority of the Member state. The set of criteria to be establish at national level should be simple and based on the article 152 of the CMO regulation.

Objective of the POs

As first objective the POs should ensuring the placing on the market and concentrating the supply, in order to keep a dynamic cereals and oilseeds market. The main activity should become from its members. But as the business practices and the need to ensure regular supply of the foof-feed chain, contracts between POs and another operator may be done in advance of the delivery date, till 24 months earlier. This type of contract, financial penalties would be apply for non-delivery of the commodities. Farmers may suffer from climatic conditions and not match the quality criteria for malting barley or mycotoxins for food. In order to avoid these financial penalties, the POs may be force to by commodities on the market in order to be compliant with its contracts. The situation of “cas de force majeure” should be taken into consideration.

On specific request for the objective of POs

- *joint transportation*: the impact will be relevant if the storage capacity and the transportation are interlink. There is development of nodal corridors within the EU. The development of the joint transport within the 10 corridors identified by the Commission would lead to significant decrease of cost;
- *joint promotion*: the trend of lower proteins content in the cereal production represent a specific challenge for the EU grain producers. The joint promotion on some specific criteria such as protein content would be valuable. In the oilseed sector, the promotion, including technical information for feeding ration, would help also to promote EU production in comparison the standard use of soyabean for the feed sector;
- *Joint use of equipment or storage facilities*: There is a need of further storage capacity in EU and the development of modern agriculture integrating new technologies such as drone would definitively increase the efficiency of the tool box for farmers to improve his business. The POs should be allow, under the production cost objective, to negotiate inputs on behalf of its members.
- *Production levels* can vary by up to 30% from one year to the next. This means that a PO's share of cereals produced by its non-members may exceed 15% simply due to this change in volumes. It is therefore essential to set this cap based on at least an Olympic average or a 5-year period.