

## Public consultation

**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 arable crops sectors.**

### ***Answer of Cooperativas Agro-alimentarias on the public consultation of the Directorate-General for Competition of the European Commission***

#### **I. Antecedents**

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1. The European Commission (EC) launched a public consultation (from 15th of January to 5th of May 2015) about the draft guidelines on the application of the specific rules set out in articles 169, 170 and 171 of the Regulation 1308/2013 (hereinafter Single CMO) in the olive oil, beef and arable crops sectors (hereinafter guidelines).
2. The draft guidelines formulated by the EC are not a mandatory regulatory framework; their purpose is to guide producers, competition authorities and jurisdictions to evaluate the practices of Producer Organizations (POs) and their Associations (APOs) within the framework of the applications of the exceptions to competition law set out by the Single CMO in those articles and sectors.
3. The guidelines describe the framework of the competition rules of general application, the specific rules laid down in articles 169, 170 and 171 of the Single CMO Regulation; and the practical application of the specific rules laid down on those articles in the agricultural sectors concerned.
4. In this document, Cooperativas Agro-alimentarias de España addresses the role of the agri-food cooperatives in light of those guidelines and addresses the opportunities within the olive-oil sector on the basis of the exceptions set out by the Single CMO and the concrete actions described in the guidelines.

## II. The role of cooperatives as POs and APOs

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5. Article 42 of the TFEU<sup>1</sup> gives legal authority to the EU legislator to incorporate exceptions to the competition law applied to the production and trade of agricultural products, keeping in mind the CAP objectives on Article 39 of the TFEU. Articles 101 to 106 of the TFEU that define the competition law of the EU are fully applied to all agreements, decisions and practices of the production and trade of certain agricultural products until there is no Community legislation that requires otherwise.
6. ***Point 14 of the guidelines acknowledges that the jurisprudence of the European Court of Justice held that organising an undertaking in the specific form of a cooperative does not, in itself, constitute an anti-competitive conduct. However, it does not follow that cooperative associations as such automatically fall outside the prohibition of Article 101(1) TFEU as they may nevertheless be liable to influence the trading conduct of its members so as to restrict or distort competition in the market in which those undertakings operate.***
7. For a PO or APO to benefit from the exceptions laid down in the Single CMO about contractual negotiations in the olive oil, beef and cereal sectors, they must comply with the following conditions related to:
  - Recognition of the POs and APOs by the Member State.
  - Comply with the objectives of the PO-APO.
  - A significant Efficiency Test.
  - Relations between the PO and its members.
  - A Cap on the product quantities subject to contractual negotiations.
  - Notification obligations.
8. Agri-food cooperatives are companies with their own legal personality, recognized in the vast majority of the European Member States legislations, actively involved and make part of the ordinary commercial trade for over 100 years. In Spain, the cooperatives form is set out in art. 129.2 of the Spanish Constitution, whose mandate was developed by the Cooperatives Act 27/1999 of the 16<sup>th</sup> of July.
9. ***The scheme of agri-food cooperatives, whether it be of first or second degree, is much more demanding in terms of law, internal governance, economic management and integration with their producer members than the minimum set out for the POs and APOs as defined in the Single CMO. Therefore, the limits set out in the framework of the competition law do not differ from the rest of the undertaking under a limited liability or non-cooperative legal form, as indicated in point 14 of the draft guidelines of the consultation. That way, a cooperative can automatically be recognized as a PO or APO, provided that it complies with the production volume requirements and the number of producers that the Member State established for its recognition, but a PO or APO does not necessarily comply with the demanding requirements to be recognized as a cooperative.***
10. ***It is concluded, therefore, that the cooperative state escapes to the possible limitations or exams of the Significant Efficiency Test, if the recognition of OP or AOP is organized under the cooperative formula, they would not have more limitations than them established by competition law set out for any other type of business. Therefore, it is concluded that the cooperative scheme falls outside the possible***

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<sup>1</sup> Treaty on the Functioning of the European Union

***limitations or tests of economic efficiency established in the draft guidelines subject to review if the recognition as PO or APO is arranged under the cooperative formula, not having more limitations than those established in the competition law for any other type of undertaking.***

### III. Role of the POs or APOs in the olive oil sector

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11. The imbalance of the agri-food chain and the high variability of annual productions cause huge price fluctuations between producing campaigns, which implies serious consequences for producers and consumers, making it very difficult to explain the existing price variations between campaigns, and especially in non-producing countries that are unfamiliar with this sector.
12. To avoid this, the European Commission drew an action plan of the olive sector<sup>2</sup> which took into account, among other measures, the need to provide the sector with mechanisms to *adapt supply to demand between seasons*.
13. This engagement has been reflected in the reform of the CAP through the retention of private storage, as well as through the creation of *Producer Organizations and their Associations*, and in the ability that is given to them to coordinate their sales in order to rebalance supply and demand. Likewise, the regulation makes provision for the possibility that the Associations of POs and the Interbranch organizations of the sector will be able to implement these measures by means of regulation extension agreements destined for those purposes.
14. To achieve these objectives, it is necessary that the specific implementing Regulation specifies the functioning of these POs and APOs, avoiding any problems with the competition law application, at national and EU level.
15. **The objective** of the olive oil sector is to integrate most of the producing sector into a PO. In addition, their goal is that they, in turn, would be part of an APO at national level, whose main purpose was the adequacy of supply and demand. Along with this, and making use of the facilities of the Olive Communal Patrimony (a sector foundation which runs a cellar with a capacity for 400 million kg of oil) that Association would pay for the cellar capacity which that measure would jointly require for the entire production sector.
16. **As a proposal**, according to Regulation 1308/2013 (Single CMO), those who would qualify as PO, according to Art 152 point 1, item c) i) would pursue the specific aim of: "ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity".
17. These POs will aim to meet the objective of, in accordance with point 1 of Article 169, "concentrating supply" which, in reference to that same point, will allow them to "negotiate, on behalf of their members, with respect to a part or the entire accumulated production of their members, contracts for the supply of Olive Oil." This activity of supply concentration could be done through an Association of POs of which they make part.
18. In addition to this objective, the POs, according to the requirement laid down in Article 169 point 1 item a), they should carry out at least one of the following activities:
  - i) joint distribution, in particular joint selling platforms and joint transportation;
  - ii) packaging, labelling and joint promotion;
  - iii) Joint organization of the quality control;

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<sup>2</sup> Presented to the Agriculture Council 22<sup>nd</sup> June 2012 by the Agriculture and Rural Development Commissioner, Dacian Cioloș.

- iv) joint use of storage equipment and facilities;
- v) joint processing;
- vi) joint management of waste directly related to the production of Olive Oil;
- vii) joint acquisition of raw materials;

19. Each PO should choose its own activity, so that it should not place higher requirements for its qualification.
20. The APO, in compliance with Article 156 point 1 paragraph 2°, "may carry out any of the activities or functions of PO." For this purpose, it will carry out the activity of supply concentration, ensuring the planning of the production and demand (we believe that this would already be sufficient for its recognition). In any case, if this weren't sufficient for its recognition, it could carry out the joint management of storage facilities, by means of the stores of Olive Communal Patrimony.
21. The negotiations by the APO, in accordance with article 169 point 2, will take place:
- a) without transfer of ownership of the olive oil".
  - b) "unless the negotiated price is the same".
  - c) "the production volume of olive oil subject to the negotiations shall not exceed 20% of the relevant market."
22. On this basis, the APO will not have any limitation as for the size, having to comply with the fact that the volume mentioned in the negotiations will not in any case be higher than 20%, as laid down in the Communication (published in the OJEU<sup>3</sup> on 7/08/2014) on the production volume of olive oil referred to in article 169, paragraph 4 (relevant market).
23. If the APOs were to obtain the necessary representation in accordance with the requirements laid down in Article 164 paragraph 3, that Association may deploy a Regulation Extension with the aim of "marketing" as established in Article 164 paragraph 4d.

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<sup>3</sup> The Official Journal of the European Union