

*Autorità Garante
della Concorrenza e del Mercato*
Direzione Rapporti Comunitari e Internazionali



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EUROPEAN COMMISSION
Directorate-General Competition
Email : COMP-E-TF-FOOD@ec.europa.eu

Subject: HT. 4145 "CAP Reform – Guidelines"

Dear Colleagues,

please find herewith enclosed the Italian Competition Authority's contribution to the public consultation on the Draft Communication from the Commission 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".

Best regards,


Ombretta Main
(Director)



Autorità Garante della Concorrenza e del Mercato

Draft Communication from the Commission

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

Public consultation- Submission of the Italian Competition Authority

The Italian Competition Authority welcomes the opportunity to comment on the draft communication from the European Commission, providing guidance on the application of the specific rules set in articles 169, 170 and 171 of Regulation EU 1308/2013 (the “CMO Regulation”).

The mentioned legislative provisions create a derogation from the application of EU competition rules in the sectors of olive oil, beef and veal and some arable crops, which operates – subject to a number of cumulative conditions – without any prior decision issued by a competition agency to that effect.

Accordingly, the beneficiaries of the derogation, i.e. the producers’ organisations jointly marketing the products of their members, will be called to self-assess whether their conduct falls within the remit of the derogation and complies with the conditions attached thereto. Therefore, clear and detailed guidance as to the scope and the operation of the derogation is paramount to ensure legal certainty for market players as well as to achieve the goals pursued by the CMO Regulation in terms of concentration of supply and generation of efficiencies.

For these reasons, the Italian Competition Authority supports the Commission’s efforts to devise a simple and user-friendly methodology to assess whether the significant efficiencies test is met when producers’ organisations integrate some activities as foreseen in the CMO Regulation.

In particular, the choice to exemplify – for each of the sectors where the derogation is applicable - to what extent and subject to which conditions the integration of each of the

activities listed in the CMO regulation may be deemed likely to generate significant efficiencies grants producers' organisations a maximum of legal certainty. In fact, when producers' organisations act in conformity with the draft guidelines' framework, they can reasonably count on the benefit of the derogation (but for the safeguard clauses), without engaging ex ante in complex estimates as to the relative significance of the integrated activities in terms of volume of the product concerned and costs of production and marketing.

In this context, the Italian Competition Authority agrees with the draft communication, inasmuch as the only relevant threshold for the significance of each of the listed activities in terms of volumes is set at 50% of the volume of production: indeed, in order to ensure that the activities integrated by the producers' associations generate substantial efficiencies, they must concern a sizable percentage of the volume of production subject to joint marketing.

Moreover, according to the Italian Competition Authority, the text of the draft communication generally paves the way to a pro-competitive interpretation of the applicable regulatory framework and may orient the market behaviour of producers' association so as to enhance its positive impact in terms of efficiency. For instance, joint promotion – whilst explicitly listed in the CMO Regulation amongst the activities which might generate significant efficiencies – is in fact seldom capable to determine remarkable cost savings. Therefore, the draft guidelines envisage that joint promotion might be deemed likely to justify the antitrust derogation only if directly linked to the development and marketing of a new value added product, while at the same time covering all volumes of such product commercialised by the producers' association.

The Italian Competition Authority is aware that any advantages in terms of legal certainty flowing from the text proposed by the Commission might in principle be weighed against the risks linked to any intervention which regulates in such detail the commercial behaviour of market players. It could indeed be argued that the very effort to provide practical examples to clarify the boundaries of the derogation might induce producers' associations to adopt uniform strategies, whereas different practices could generate comparable efficiency gains.

Therefore, the Italian Competition Authority encourages the Commission to explicitly identify any other practices which – in relation to each of the listed activities in the relevant sectors – might fulfil the significant efficiencies test. However, the Italian Competition Authority also underlines that in any event the derogation remains applicable even when the conditions under the simplified method are not met, provided the integration of activities carried out by producers' associations may still generate significant efficiencies, which may contribute to the achievement of the common agricultural policy objectives.

Articles 169, 170 and 171 of the CMO Regulation envisage safeguard clauses, whereby national competition agencies may intervene to demand that joint negotiations carried out by producers' associations on behalf of their members in the fields of arable crops, olive oil or

beef and veal – even when the applicable quantitative thresholds are respected - be re-opened or not take place at all. This may happen, *inter alia*, when national competition agencies consider that such intervention is warranted to prevent the exclusion of competition, or when joint negotiations may otherwise hamper the objectives of common agricultural policy.

The Italian Competition Authority notes that the draft communication elaborates more extensively on the notion of exclusion of competition, dwelling on the case law of EU courts on the application of article 101(3) TFEU. However, the guidelines provide very scant indications as to the circumstances where the joint negotiations by producers' associations – while not excluding competition – might nevertheless be deemed incompatible with the pursuit of the common agricultural policy's objectives.

Paragraph 98 of the draft communication merely states that such situation could materialise in cases where a producers' association has made a self-assessment based on the simplified method, thus triggering an assumption that its activities overall contribute to the fulfilment of the CAP objectives. However, "a competition authority may find that in practice this is not the case, even if the [relevant] criteria are met".

In principle, the concentration of supply realised by producers' associations might have an impact on consumer prices, which could run contrary – in specific circumstances – to article 39(1)(e) TFEU, whereby common agricultural policy is intended to ensure that supplies reach consumers at reasonable prices. However, the somewhat inconclusive formulation of the safeguard clause may lead to uncertainties as to the margin of manoeuvre left to national competition agencies, and the nature of the assessment they are supposed to carry out.

The Italian Competition Authority submits that the safeguard clause in question should only operate where the concentration of supply may have a significant impact on the level of consumer prices. Accordingly, agricultural producers may entirely internalise any productivity gains flowing from the integration of efficiency-enhancing activities through their associations (which would not be allowed under article 101(3) TFEU, whereby consumers should receive a fair share of any efficiencies generated by restrictive conduct), provided there are no appreciable effects on prices.

On the other hand, if the Commission considers that significant price increases would still be insufficient to trigger the safeguard clause, unless absolute price levels become "unreasonable", this should be clearly stated in the draft guidelines. However, the Italian Competition Authority underlines that any assessment as to the reasonableness of prices entails complex methodological issues, which competition agencies may be ill-placed to handle.

Finally, the Italian Competition Authority wishes to comment to the sector specific section of the draft communication, providing guidance as to the identification of the relevant market for olive oil.

The definition of the relevant market(s) for olive oil is crucial for the operation of the CMO Regulation, since the relevant quantitative threshold to benefit from the antitrust derogation is set at 20% of the relevant market.

The Italian Competition Authority generally concurs with the conclusions drawn by the draft guidelines on the identification of the relevant product market. It notes, however, that pursuant to paragraph 108 of the document “from a geographical point of view the relevant market for supply of olive oil would seem not to be narrower than national and would possibly be EEA wide with respect to all three sales channels”.

The Italian Competition Authority is aware that some factual elements could point towards a supra-national definition of the olive oil markets. Nonetheless, neither the European Commission, nor any national competition agencies, have ever carried out a comprehensive analysis of this economic sector, gathering conclusive and reliable evidence as to the geographic dimension of the relevant markets.

As in this context market definition is instrumental to defining *ex ante* the scope of an antitrust derogation which should be narrowly interpreted, in light of its inherently exceptional character, the Italian Competition Authority considers more appropriate to simply state in the guidelines that “the relevant market for supply of olive oils would seem not to be narrower than national”, without including an explicit reference to a supra-national dimension.

While this issue is not immediately relevant for the Italian markets, where the current extreme fragmentation of supply makes future excessive concentration levels a relatively unlikely occurrence, the Italian Competition Authority considers that in policy terms it would be undesirable to assume in the absence of a thorough sectoral analysis that a concentration of supply of 20% of the EU production of olive oil (equal to the entire Italian production in the year 2013) would still automatically qualify for a derogation from the antitrust prohibitions.

THE SECRETARY GENERAL

