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**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**

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## **1. Introduction**

### **1.1 Purpose and scope**

- (1) These Guidelines<sup>1</sup> provide guidance for the application by producers from the olive oil, beef and veal and arable crops sectors of Articles 169, 170 and 171 of the CMO Regulation<sup>2</sup> laying down specific rules for contractual negotiations in these sectors.
- (2) While the Guidelines aim to provide specific guidance to producers, it remains the responsibility of the producers to assess their own practices. The Guidelines also intend to give guidance to the courts and competition authorities of the Member States in their application of Articles 169, 170 and 171 of the CMO Regulation although they are not legally binding on them.
- (3) Articles 169, 170 and 171 of the CMO Regulation concern certain agricultural products in the sectors of olive oil, beef and veal and arable crops<sup>3</sup>.
- (4) Articles 169, 170 and 171 of the CMO Regulation allow Producer Organisations (hereinafter "POs") and Associations of Producer Organisations (hereinafter "APOs") to negotiate, on behalf of their members, contracts for the supply of the products concerned under a number of conditions.<sup>4</sup>
- (5) The entities concerned are defined as follows:
  - A Producer is a producer of the product concerned;
  - A PO is an organisation of producers as defined in Article 152 of the CMO Regulation;
  - An APO is an Association of Producer Organisations as defined in Article 156 of the CMO Regulation.

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<sup>1</sup> The Guidelines on the application of the specific rules laid down in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors (thereinafter "the Guidelines").

<sup>2</sup> The "CMO Regulation" is the 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, published in OJ L 347, 20.12.2013, p. 671.

<sup>3</sup> These sectors were determined by the legislator in the context of the CAP reform and the adoption of the CMO Regulation.

<sup>4</sup> In particular, Articles 169, 170 and 171 of the CMO Regulation apply exclusively to a specific category of POs and APOs, which are recognised by Member States under Articles 152(1) and 156 of the CMO Regulation, i.e. these rules does not concern any PO or APO. For further details see paragraph (54) below.

Where the Guidelines refer in the context of the Derogation defined in Section 2.2 to a PO (POs), the same is valid for an APO (APOs) if not explicitly specified otherwise.

The recognised interbranch organisations are not covered by Articles 169-171 of the CMO Regulation. They may however benefit from the derogation possibility set out in Article 210 of the CMO Regulation.

- (6) The Commission's position is without prejudice to the case law of the Court of Justice of the European Union<sup>5</sup> concerning the interpretation of Articles 39, 42, 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") and of Articles 169, 170 and 171 of the CMO Regulation.
- (7) The Guidelines address the following issues:
- The framework of generally applicable competition rules;
  - The specific rules set out in Articles 169, 170 and 171 of the CMO Regulation;
  - Practical application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation in the agricultural sectors concerned.

## **2. Rules applicable to agreements between agricultural producers in the sectors of olive oil, beef and veal and arable crops**

### **2.1 The legal framework – the application of Articles 101 and 102 TFEU to production of and trade in agricultural products**

- (8) Article 42 TFEU confers on the EU legislator (the European Parliament and the Council) the power to determine the extent to which competition rules apply to the production of and trade in agricultural products.
- (9) More precisely, according to Article 42 TFEU the legislator determines the extent of the application of competition rules to the agricultural sector, taking into account the objectives of the Common Agricultural Policy (hereinafter the "CAP objectives") set out in Article 39 TFEU. According to the Court of Justice of the European Union that provision recognizes the precedence of the objectives of the agricultural policy over the aims of the Treaty in relation to competition<sup>6</sup>.
- (10) According to Article 39 TFEU, the CAP objectives are the following:

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<sup>5</sup> The Court of Justice of the European Union here refers to the Court of Justice and the General Court.

<sup>6</sup> Judgment in *Maizena*, 139/79, ECLI:EU:C:1980:250, paragraph 23; Judgement in *Milk Marque*, C-137/00, ECLI:EU:C:2003:429, paragraph 91; Judgment in *Germany v Council*, C-280/93, ECLI:EU:C:1994:367, paragraph 61.

- a. to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- b. to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- c. to stabilise markets;
- d. to assure the availability of supplies and
- e. to ensure that supplies reach consumers at reasonable prices.

(11) On the basis of Article 42 TFEU Article 206 of the CMO Regulation declares the competition rules in Articles 101 to 106 TFEU applicable to the production and trade in agricultural products:

*"Save as otherwise provided in this Regulation, and in accordance with Article 42 TFEU, Articles 101 to 106 TFEU and the implementing provisions thereto shall, subject to Articles 207 to 210 of this Regulation, apply to all agreements, decisions and practices referred to in Article 101(1) and Article 102 TFEU which relate to the production of, or trade in, agricultural products."*

(12) Articles 101 and 102 TFEU apply to the behaviour of undertakings in the form of agreements, decisions, practices or an abuse of a dominant position, only in so far as they *"may affect trade between Member States"*. Details concerning the interpretation of this applicability criterion are contained in Commission Guidelines on the effect on trade<sup>7</sup>.

(13) Article 101 TFEU applies, in principle, to all economic activities of producers and POs. A PO is an association of individual producers, which under EU competition law qualifies as an association of undertakings and, as an undertaking in its own right<sup>8</sup>, where it conducts an economic activity. Both, a PO and its members are therefore subject to competition rules. Accordingly, 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.

(14) When assessing the applicability of Article 101(1) TFEU to cooperatives (which is one of the possible forms in which a PO could be set up), the Court of Justice of the European Union held that organising an undertaking in the specific form of a cooperative

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<sup>7</sup> Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, p. 81.

<sup>8</sup> An economic activity is defined as an activity consisting in offering goods and services on a given market. For details see: e.g. judgment in *Commission v Italy*, 118/85, EU:C:1987:283, paragraph 7. An undertaking is an entity engaged in an economic activity.

association does not in itself constitute 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<sup>9</sup>.

(15) **Example** of the application of Article 101 to the activities of producers:

**Situation:** The market for live cattle supply in a country experiences a continuous decrease of domestic demand because end-consumer demand for beef diminishes. In addition, imports of carcasses and cut beef, and to a lesser extent imports of live cattle increase. Slaughterhouses in the country reduce significantly their purchases of live cattle and prices of live cattle decrease significantly. In order to face this situation, a large number of live cattle suppliers (covering approximately 60% of the live cattle market) conclude an agreement among themselves, which sets a minimum sale price for their live cattle to be sold to slaughterhouses.

**Analysis:** The agreement has the object of restricting competition by setting a uniform price. As such, it violates the prohibition of anticompetitive agreements, decisions of associations and concerted practices set out in Article 101(1) TFEU. The agreement does not create any benefit for the consumers and eliminates competition for a substantial part of the market for live cattle. It cannot be therefore justified on the basis of Article 101(3) TFEU. Accordingly, such agreement constitutes a breach of Article 101 TFEU and is prohibited and void.

(16) Article 102 TFEU also applies to producers as well as to a PO acting as an undertaking. The prohibition of abuse of a dominant position provided for in Article 102 TFEU, is fully applicable in the agricultural sector. However, in order for Article 102 TFEU to be infringed, the following conditions have to be fulfilled:

- a. Firstly, a PO or a producer must hold a dominant position on a given product and geographic market (the relevant market)<sup>10</sup>, i.e. a position of economic strength which enables it to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers<sup>11</sup>.

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<sup>9</sup> For further details and background see judgement in *Oude Luttikhuis*, C-399/93, EU:C:1995:434, paragraphs 10 -16. See also the Opinion of Advocate General Tesouro in this case, EU:C:1995:277, paragraph 29-30.

<sup>10</sup> For details see: Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

<sup>11</sup> Judgment in *United Brands*, 27/76, EU:C:1995:277, paragraph 65.

- b. Secondly, the PO or producer must abuse its dominant position by engaging into exclusionary and/or exploitative practices to the detriment of competitors, customers and/or consumers<sup>12</sup>.
- c. These practices affect trade between Member States<sup>13</sup>.

(17) **Example** of the application of Article 102 to the activities of a PO:

**Situation:** A wheat producing region is very distant from other wheat producing regions. Wheat is used in the region either for milling to produce flour in local mills or to produce feed for animals raised in the area. Wheat for milling is required to respect more stringent quality specifications and is sold at higher prices than wheat for feed. There are some imports of wheat from a neighbouring country which complement local supply usually at higher prices than local prices due to transport costs. A large PO grouping half of the local wheat producers (in terms of volume of production) has been supplying most local millers, while other producers remained less organised and supplied feed processors and millers for their residual demand (not served by the large PO) when available. The members of the large PO are bound to supply all their production to the PO by the statutes of the PO and because of a number of legal and practical issues, these members very rarely exit the PO. A few years ago a number of farmers which are not members of the large PO created another PO which has improved the quality and output of the wheat produced and invested in a storage and distribution system to supply wheat on larger scales. This new smaller PO gradually convinced the local millers to purchase wheat from them rather than from the large PO. Faced with its gradual loss of the more profitable milling wheat market, the large PO decides to reduce the wholesale prices of milling wheat (grains) below variable costs to regain its customers and effectively regains some of these customers to the detriment of its emerging competitor.

**Analysis:** The market for the supply of wheat is likely to be no larger than the region at hand given the high transport costs from other producing regions into the region concerned. The large PO at hand is likely to have a dominant position considering its market share, its control over supply through the exclusivity obligation imposed on its members and the fact that imports cannot replace its supply because of high transport costs. The dominant position is

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<sup>12</sup> Exclusionary abuses are those practices not based on normal business performance which seek to harm the competitive position of the dominant company's competitors, or to exclude them from the market altogether, ultimately causing harm to the customers (such as refusals to supply, to grant a licence, predatory prices). Exploitative abuses, on the other hand, involve the attempt by a dominant company to exploit the opportunities provided by its market strength in order to harm customers directly, for instance by imposing excessive prices. For further details see Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

<sup>13</sup> For details see: Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81.



likely to have a stable character notably because members rarely exit the PO and the difficulty for alternative sources of wheat to supply large volumes. The predatory pricing strategy<sup>14</sup> of the large PO aimed to exclude and effectively evicted partly a competitor (the smaller PO) from the market. Accordingly, the PO is likely to have abused its dominant position contrary to Article 102 TFEU.

- (18) Articles 101 and 102 TFEU also apply to agreements between members of a PO and between a PO and its members, including internal decisions and statutes of a PO. The Court of Justice addressed the issue of statutes of cooperatives and their compliance with Article 101(1) TFEU in several cases<sup>15</sup>, where it also recognised the pro-competitive effects of such cooperative arrangements under certain conditions<sup>16</sup>.
- (19) **Example** of the application of Article 101 to the agreements between members of a PO:

**Situation:** Several small producers of malting barley set up a PO in order to sell together through a common supply contract with a common price to a local whisky distillery. The producers did so in particular because they are not able to provide the volumes requested by the distillery separately and the distillery does not want to deal with several separate small suppliers. The PO handles the whole marketing of malting barley supply and organises the logistics of supply, including transportation. The PO represents 8% of the market for supply of malting barley to distilleries in the region.

**Analysis:** Joint sale practices by the producers are caught by the prohibition of anticompetitive agreements set out in Article 101(1) TFEU because it eliminates price competition between independent producers. However, the commercialisation system organised in the PO appears to create important benefits in terms of distribution of goods which are passed on to consumers. First of all, it ensures that there is an additional supplier on the market able to provide the quantities requested by the buyer, thereby increasing competition to the benefit of that buyer. It may also reduce the cost of supply through a better integrated logistical system and reduced transaction costs compared to purchases by the buyer directly from all individual producers. Competition is unlikely to be restricted given the small share of the market represented by the PO. Accordingly, the agreement at hand is likely to be justified under Article 101(3) TFEU.

<sup>14</sup> For further details concerning determination of predatory conduct see Section C (mainly paragraphs 63-66) of Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

<sup>15</sup> See *inter alia* judgment in *Oude Luttikhuis* EU:C:1995:434, paragraph 13; judgment in *Dansk Landbrugs Grovareselskab (DLG)*, C-250/92, EU:C:1994:413, e.g. paragraphs 28 and 35.

<sup>16</sup> E.g. judgment in *Dansk Landbrugs Grovareselskab (DLG)*, EU:C:1994:413, paragraph 32; judgment in *Oude Luttikhuis*, EU:C:1995:434, paragraph 12; judgment of 14 May 1997, *Florimex*, T-70/92 and T-71/92, EU:T:1997:69, paragraph 40.

(20) While Articles 101 and 102 TFEU generally apply to agreements between producers, whether inside of a PO or outside of a PO, and to agreements concluded by POs, whether with their members or with third parties, these agreements may be exempted from their application on the basis of either the CMO Regulation or general competition rules as described below in sections 2.2 and 2.3.

## **2.2 Derogation from the application of Articles 101 and 102 TFEU created by Articles 169, 170 and 171 of the CMO Regulation for the sectors of olive oil, beef and veal, and arable crops**

(21) 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, 170 and 171 of the CMO Regulation create derogations from the application of Articles 101<sup>17</sup> <sup>18</sup> and 102<sup>19</sup> TFEU.

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<sup>17</sup> The Guidelines apply to the supply contracts negotiated by POs on behalf of their members irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation, OJ L 24, 29.01.2004, p. 1) as would be the case, for example, with joint ventures performing on a lasting basis all the functions of an autonomous economic entity.

<sup>18</sup> Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

- (22) All together or separately Articles 169, 170 and 171 of the CMO Regulation will be referred to in the Guidelines as "the Derogation".
- (23) Articles 169, 170 and 171 of the CMO Regulation concern olive oil, beef and veal products, and certain products from the arable crop sector<sup>20</sup>. Articles 169(1), 170(1) and 171(1) of the CMO Regulation stipulate that "*[a] producer organisation in the [...] sector which is recognised under Article 152(1) and which pursues one or more of the objectives of concentrating supply, the placing on the market of the products produced by its members and optimising production costs, may negotiate on behalf of its members, in respect of part or all of the aggregate production of their members, contracts for the supply of*" the products of these sectors covered by the definitions laid out in these articles.

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(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

<sup>19</sup> Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>20</sup> The following products not intended for sowing and in the case of barley not intended for malting are covered by Article 171 of the CMO Regulation:

- (a) common wheat falling within CN code ex 1001 99 00;
- (b) barley falling within CN code ex 1003 90 00;
- (c) maize falling within CN code 1005 90 00;
- (d) rye falling within CN code 1002 90 00;
- (e) durum wheat falling within CN code 1001 19 00;
- (f) oats falling within CN code 1004 90 00;
- (g) triticale falling within CN code ex 1008 60 00;
- (h) rapeseed falling within CN code ex 1205;
- (i) sunflower seed falling within CN code ex 1206 00;
- (j) soya beans falling within CN code 1201 90 00;
- (k) field beans falling within CN codes ex 0708 and ex 0713;
- (l) field peas falling within CN codes ex 0708 and ex 0713.

- (24) Articles 169, 170 and 171 of the CMO Regulation thus concern any agreements or decisions or practices taken by the PO when negotiating contracts for supply on behalf of its members.
- (25) Articles 169, 170 and 171 of the CMO Regulation allow<sup>21</sup> 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.
- (26) The purpose of the Derogation is to strengthen the bargaining power of producers in the sectors concerned vis-à-vis downstream operators in order to ensure a fair standard of living for the producers and a viable development of production. This objective must be reached in compliance with the CAP objectives as set out in Article 39 TFEU: more precisely, this should be achieved by generating significant efficiencies through the integration of activities in POs so that the activities of these POs overall contribute to the fulfilment of CAP objectives.<sup>22</sup>
- (27) The Derogation's purpose is to be achieved through POs effectively concentrating supply and placing products on the market<sup>23</sup> and, as a consequence, negotiating supply contracts on behalf of their members. Ensuring compliance with the objectives of concentrating supply and placing products on the market requires from such POs that they pursue effectively a commercialisation strategy.
- (28) In carrying out their strategy, such POs would normally negotiate and set all elements relating to supply contracts: prices, volumes and possibly also other contractual terms such as references to quality specifications of the products, duration of the contract, termination clauses, exit clauses<sup>24</sup>, details regarding payment periods and procedures, arrangements for collecting and delivering products as well as rules applicable in the event of force majeure.
- (29) The implementation of the commercialisation strategy of the PO may also entail agreements and practices between the PO and its members which are intrinsically linked to the commercialisation strategy of a PO such as production planning<sup>25</sup> and exchanges of commercially sensitive information<sup>26</sup>.

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<sup>21</sup> See paragraph 1 of these Articles 169, 170 and 171 of the CMO Regulation.

<sup>22</sup> See recital 139 of the CMO Regulation.

<sup>23</sup> Paragraph 2(d) of Articles 169-171 of the CMO Regulation.

<sup>24</sup> Exit of a contract may be required for instance in the case of a crop failure caused e.g. by weather conditions or diseases.

<sup>25</sup> The commercialisation strategy of the PO may require planning the production of the members to ensure the delivery of products by members to the PO in line with the commercialisation strategy. Accordingly, the situation where production planning forms part of the commercialisation strategy of PO would be

- (30) In the Guidelines, the "negotiation of supply contracts by a PO on behalf of its members" will be referred to as "contractual negotiations".
- (31) The contractual negotiations can have different forms: e.g. auctions (physical or on-line), telephone sales, spot market, futures exchange. The form of the contractual negotiations does not influence the application of the Derogation.
- (32) Contractual negotiations can be carried out by a PO in different forms, e.g. based on bilateral trading or through publicly traded markets<sup>27</sup>. Contractual negotiations may take place with or without the transfer of ownership of the products by the producers to the PO<sup>28</sup>. Further, these Joint Supply activities may take place regardless of whether the price of supply negotiated by the PO is for all or part of the production of the members of the PO<sup>29</sup>.
- (33) However, a PO must fulfil a number of conditions<sup>30</sup> when negotiating supply contracts on behalf of its members in order to benefit from the Derogation:
- a. The PO must be formally recognised by national authorities in line with Article 152(1) of the CMO Regulation (or Article 156(1) of the CMO Regulation for APOs);
  - b. The PO must pursue one or more of the objectives of concentrating supply, the placing on the market of the products produced by its members or optimising production costs;

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covered by the Derogation. This situation however differs from the situation where production planning is carried out outside such strategy. In the latter case production planning may be covered by other derogations from competition rules under the CMO Regulation.

<sup>26</sup> The commercialisation strategy of the PO may require the exchange of commercially sensitive information between members in order for instance to identify the capacity for members to increase deliveries to the PO. Accordingly, the situation where the exchange of commercially sensitive information forms part of the commercialisation strategy of PO would be covered by the Derogation. This situation however differs from the situation where the exchange of commercially sensitive information is carried out outside such strategy. In the latter case the exchange of commercially sensitive information may be covered by other derogations from competition rules under the CMO Regulation.

<sup>27</sup> The PO may set up and run the publicly traded market, e.g. an auction platform, itself.

<sup>28</sup> See paragraph 2(a) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>29</sup> See paragraph 2(b) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>30</sup> This is only an overview of the most important conditions; specific elements will be dealt with in detail in the following sections and a complete list can be found in the respective legislation, namely Articles 169, 170 and 171 of the CMO Regulation.

- c. These objectives are reached provided that their pursuit leads to integration of activities and such integration is likely to lead to significant efficiencies so that activities of the PO overall contribute to the fulfilment of CAP objectives;
- e. The volume of a given product subject to negotiations by a particular PO must not exceed 15% of the total national production (for arable crops and for beef and veal) / 20% (for olive oil) of the relevant market;
- f. Producers cannot be members of more than one PO negotiating supply contracts on their behalf.
- g. The PO must notify the volume of product concerned covered by the negotiations to the competent national authorities.

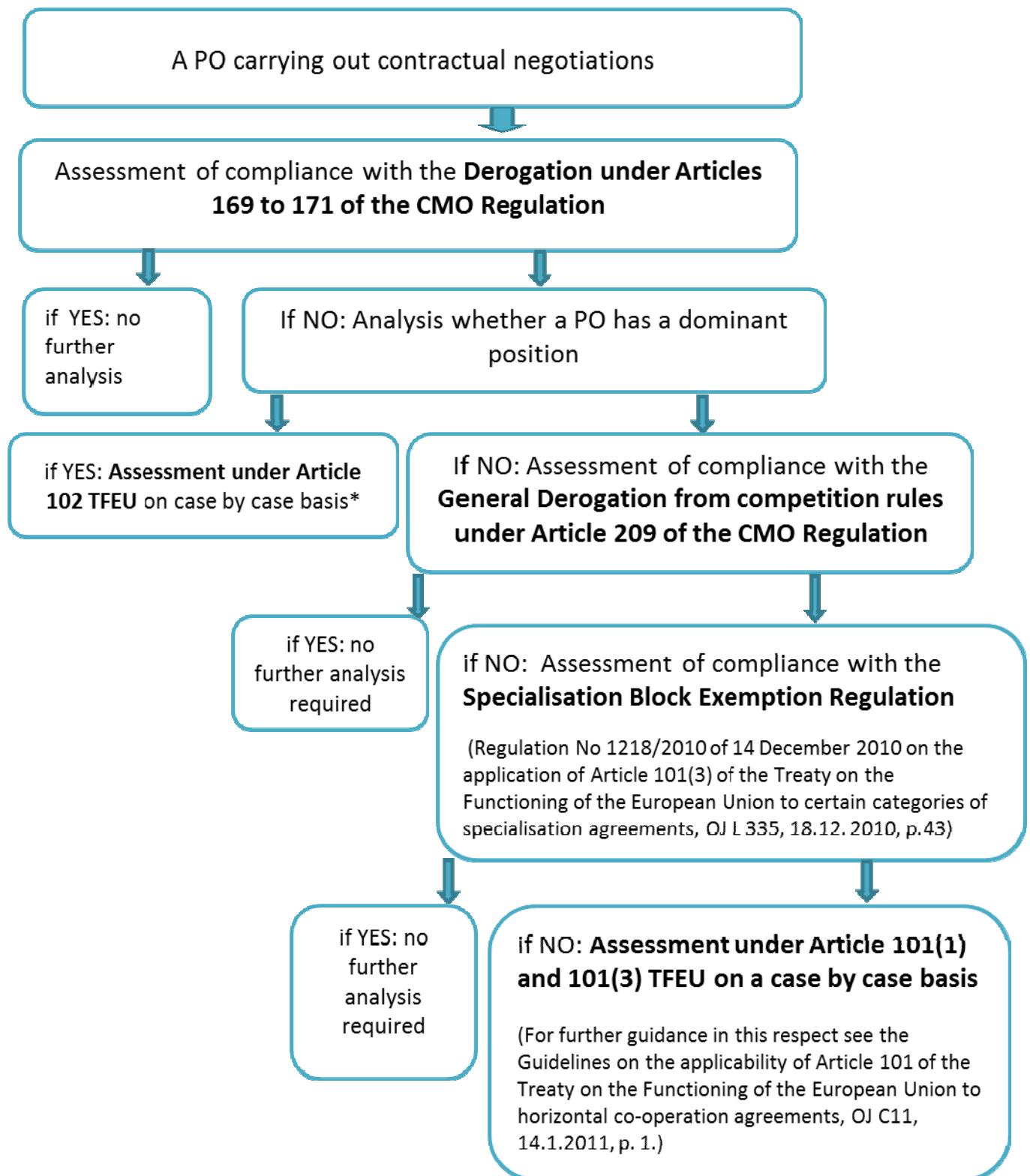
(34) These specific conditions will be discussed in detail in section 2.4.

(35) An agreement, decision or concerted practice which does not respect the conditions set out by Articles 169, 170 and 171 of the CMO Regulation (for instance because the joint sale of arable crop products would cover more than 15% of the total national production of the product) cannot benefit from the Derogation but does not automatically entail an infringement of competition rules as discussed below in Section 2.3.

### **2.3 Alternative assessment possibilities for ensuring the legality of a PO's negotiations on behalf of its members of contracts of supply**

(36) First, it needs to be recalled that the rules set out by Articles 169, 170 and 171 of the CMO Regulation have the character of a competition law Derogation or "safe harbour", where Articles 101 and 102 TFEU are considered not to apply. However, non-compliance with the conditions of the Derogation does not constitute a direct and immediate breach of competition rules. There are several alternative ways to ensure the compatibility with Articles 101 and 102 TFEU of agreements, decisions and practices linked to contractual negotiations.

(37) A PO and/or its members in the sectors of olive oil, beef and veal and arable crops can assess if the activities of a PO carrying out, among others, contractual negotiations comply with Articles 101 and 102 TFEU in the following ways:



\* For aspects of the contractual negotiations carried out by a dominant PO possibly relevant for the application of Article 101(1) TFEU see also the path for non-dominant POs.

(38) The following subsections explain these assessments. The text of these subsections describes only basic elements of the application of these instruments. The full list of conditions can be found only in the respective legislative texts.

### **2.3.1 General Derogation from competition rules under Article 209 of the CMO Regulation**

(39) Article 206 of the CMO Regulation confirms the general principle that EU competition law applies to production and trade in agricultural products. This is however subject to Articles 207 – 210 of the CMO Regulation. Article 209 of the CMO Regulation excludes from the scope of application of Article 101(1) TFEU agreements, decisions and practices which relate to the production of, or trade in, agricultural products if certain conditions are fulfilled. Such derogation, contrary to Articles 169, 170 and 171 of the CMO Regulation, applies to all agricultural sectors covered by the CMO Regulation. It is thus a separate, self-standing instrument and is referred to hereinafter as "General Derogation".

(40) Producers can benefit from this General Derogation in two different situations:

a. Article 101(1) TFEU does not apply to agreements, decisions and practices which relate to the production of, or trade in, agricultural products if they are necessary for the attainment of the CAP objectives set out in Article 39 TFEU. The Court of Justice held in this context that even if an agreement can be considered necessary for the attainment of one or more of these objectives, but is not necessary to fulfil another objective (or, even jeopardises another objective), it cannot be covered by this derogation<sup>31</sup> (first sub-paragraph of Article 209(1) of the CMO Regulation);

b. Article 101(1) TFEU does not apply to agreements, decisions and concerted practices of:

- producers;
- producers' associations;
- associations of such associations;
- POs recognised under Article 152 of the CMO Regulation;
- APOs recognised under Article 156 of the CMO 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 CAP objectives are jeopardised (second sub-paragraph of Article 209(1) of the CMO Regulation).

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<sup>31</sup> Judgement in Frubo, 71/74, EU:C:1975:61; judgment in Florimex, footnote 16 above, EU:T:1997:69; judgment in Oude Luttikhuis EU:C:1995:434; judgment of 13 December 2006, FNCBV v Commission, T-217/03 and T-245/03, EU:T:2006:391.



- (41) The General Derogation (both forms) is not applicable to agreements, decisions and concerted practices which entail an obligation to charge an identical price or by which competition is excluded.
- (42) No prior decision of the Commission or of a National Competition Authority is necessary in order to benefit from the General Derogation set out in Article 209 of the CMO Regulation, i.e. its application is based on self-assessment by the producers. The burden of proving the infringement of Article 101(1) TFEU in any national or EU proceedings rests on those alleging the infringement. However, the party claiming the benefit of the General Derogation bears the burden of proving that the conditions of the General Derogation are fulfilled.

### **2.3.2 Specialisation Block Exemption Regulation**

- (43) In accordance with Commission Regulation (EU) No 1218/2010<sup>32</sup> (hereinafter "the Specialisation Block Exemption") specialisation agreements may include, *inter alia* agreements, decisions or concerted practices between undertakings whereby they agree to jointly produce certain products or to sub-contract to each other the production of one or more products (one undertaking becoming the exclusive producer for one of these products)<sup>33</sup>.
- (44) With particular regard to the agricultural sector, a specialisation agreement may refer to joint production of agricultural products and any activity of processing/transforming agricultural products into other products, such as slaughtering and cutting meat, milling cereals etc. In the context of agricultural POs, a specialisation agreement is more likely to concern processing/transforming of raw agricultural products into other products as there are few joint-ventures on production of raw agricultural products.
- (45) The Specialisation Block Exemption Regulation lays down that, pursuant to Article 101(3) TFEU, Article 101 (1) TFEU does not apply to specialisation agreements provided that certain conditions are met<sup>34</sup>.
- (46) First, the combined market shares of the parties must not exceed 20% of the relevant market.
- (47) Second, the specialisation agreements must not include any hard-core restrictions i.e. fixing prices, limiting output and allocating markets or customers.
- (48) There are however exceptions. The safe harbour of the Specialisation Block Exemption may apply to<sup>35</sup>:

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<sup>32</sup> 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, OJ L 335, 18.12. 2010, p. 43.

<sup>33</sup> For details concerning the definitions see Article 1 of the Specialisation Block Exemption.

<sup>34</sup> Article 2 of the Specialisation Block Exemption.

- Fixing of prices charged to immediate customers in the context of joint distribution of the products produced through the specialisation agreement;
- Setting of capacity and production of volume in the context of a joint production agreement; and
- Setting of sales targets in the context of joint distribution of the products produced through the specialisation agreement.

(49) **Example** of possible application of Specialisation Block Exemption in agricultural sector:

**Situation:** Several arable crop producers agree to jointly produce animal feed from rapeseed. Previously, they were only selling the seeds to processors of the seeds. They conclude a joint production agreement covering the totality of their rapeseed production. Further, they carry out joint distribution and jointly determine the price for which they sell all of their production of animal feed from rapeseed to cattle producers. Within a year, the arable crops producers have reached a 9.3% market share on the market for animal feed made from rapeseed.

**Analysis:** Joint production agreements are considered as one of the types of specialisation agreements covered by the Specialisation Block Exemption. The narrowest possible market appears to be the market for animal feed from rapeseed (it may be larger and comprise animal feed from other sources). The combined market share of the parties on the market for animal feed from rapeseed does not exceed 20% as required by Article 3 of the Block Exemption. Despite the fact that the agreement includes determination of prices, the fixing of prices charged to immediate customers (here cattle producers) in the context of joint distribution is acceptable under Article 4 a) of the Block Exemption. The fact that the agreement involves an exclusive supply obligation from the side of three arable crops producers is also covered by the Block Exemption (Article 2(3)a). Accordingly, the joint production agreement at hand would be covered by the Specialisation Block Exemption and would not amount to an anticompetitive agreement in breach of Article 101 TFEU.

### **2.3.3 Individual assessment under Article 101(1) and (3) and Article 102 TFEU**

(50) All undertakings, including agricultural producers and POs can self-assess the compatibility of their agreements, decisions or practices under Article 101(1) and (3) and Article 102 TFEU.

(51) In order to provide guidance and facilitate the self-assessment by undertakings of their agreements, decisions and practices, the Commission has adopted guidelines/guidance concerning the application of Articles 101 and 102 TFEU. In this context, the most relevant are:

- Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements<sup>36</sup>; in particular as regards joint production

<sup>35</sup> Article 4 of the Specialisation Block Exemption.

<sup>36</sup> OJ C 11, 14.1.2011, p. 1.

agreements<sup>37</sup> and joint commercialisation agreements<sup>38</sup> (for joint commercialisation agreement see also an example in paragraph (19) above);

- Guidelines on the application of Article 81(3) of the Treaty [*currently Article 101(3) TFEU*]<sup>39</sup>.

## 2.4 Conditions of the Derogation

(52) The Derogation created by Articles 169-171 of the CMO Regulation is subject to a number of conditions regarding:

- a. The recognition of the PO/APO
- b. The objectives of the PO
- c. A Significant Efficiency Test
- d. The relations between the PO and its members
- e. A cap on the product quantities subject to contractual negotiations
- f. Notification obligations

(53) This section will analyse each of these conditions.

### 2.4.1 Recognition of a PO/ an APO

(54) A PO or an APO must be formally recognised by national authorities in line with Article 152(1) and Article 156 of the CMO Regulation<sup>40</sup>. A PO can be a legal entity or a part thereof.

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<sup>37</sup> See paragraphs 150 to 293 of the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements.

<sup>38</sup> Details concerning joint commercialisation agreements in paragraphs 225-257 of the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements.

<sup>39</sup> OJ C 101, 27.4.2004, p. 97.

<sup>40</sup> Article 152

Producer organisations

1. Member States may, on request, recognise producer organisations, which:

(a) are constituted, and controlled in accordance with point (c) of Article 153(2), by producers in a specific sector listed in Article 1(2);

(b) are formed on the initiative of the producers;

(c) pursue a specific aim which may include at least one of the following objectives:

(i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

- (55) The recognition procedure is carried out by a national authority determined by the relevant Member State.
- (56) A PO may be a member of another PO (a so-called "second-tier PO"), which commercialises the output supplied by its member POs. The Member State concerned decides whether such second-tier POs are recognised as POs or as APOs. Given that the Derogation applies equally to POs and APOs, the second-tier PO may in both situations benefit from the Derogation.
- (57) Members of a PO can be, apart from producers, also entities which are not producers of the agricultural products concerned. POs with participation of non-producers must comply with all conditions concerning the setting up of POs and their statutes, including decision making and democratic control as set out in Articles 152, 153 and 154 of the CMO Regulation.

#### **2.4.2 Objectives of a PO**

- (58) A PO must, in order to benefit from the Derogation, pursue at least one of the following objectives of:
  - a. concentrating supply,
  - b. placing on the market of the products produced by its members<sup>41</sup>; and

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- (ii) concentration of supply and the placing on the market of the products produced by its members, including through direct marketing;
  - (iii) optimising production costs and returns on investments in response to environmental and animal welfare standards, and stabilising producer prices;
  - (iv) carrying out research and developing initiatives on sustainable production methods, innovative practices, economic competitiveness and market developments;
  - (v) promoting, and providing technical assistance for, the use of environmentally sound cultivation practices and production techniques, and sound animal welfare practices and techniques;
  - (vi) promoting, and providing technical assistance for, the use of production standards, improving product quality and developing products with a protected designation of origin, with a protected geographical indication or covered by a national quality label;
  - (vii) the management of by-products and of waste in particular to protect the quality of water, soil and landscape and preserving or encouraging biodiversity;
  - (viii) contributing to a sustainable use of natural resources and to climate change mitigation;
  - (ix) developing initiatives in the area of promotion and marketing;
  - (x) managing of the mutual funds referred to in operational programmes in the fruit and vegetables sector referred to in Article 31(2) of this Regulation and under Article 36 of Regulation (EU) No 1305/2013
  - (xi) providing the necessary technical assistance for the use of the futures markets and of insurance schemes.

<sup>41</sup> A PO makes efforts to effectively sell products; i.e. it does not only carry out a joint marketing strategy but also makes sales offers and concludes sales with customers/buyers with respect to the products of its members.

c. optimising of production costs.<sup>42</sup>

- (59) The Derogation further requires that a PO actually concentrates supply and places the products of its members on the market for the volume of the products covered by contractual negotiations<sup>43</sup>. Accordingly, pursuing the objective of optimising production costs (letter c. above), if not accompanied by the actual realisation of the remaining two objectives of concentration of supply and the placing on the market of the products produced by its members, will not be sufficient in order to benefit from the Derogation.
- (60) The objective of placing on the market refers to the products produced by its members. This does not exclude that, as an ancillary activity, a PO may equally include in contractual negotiations products separately bought by the PO. This is consistent with the other objective of the PO of concentrating supply. The possibility of including products separately bought from non-members<sup>44</sup> would allow POs, in certain situations, to reach bigger customers requiring larger volumes than what members can offer at that moment in time. This possibility would also allow the PO to replace the production of members lacking at certain points in time, for instance due to unfavourable weather conditions, thus avoiding the risk that the PO loses a customer.
- (61) Under the Derogation, however, buying products from non-members cannot become a main activity of a PO: under the Derogation a PO should, first of all, aim to place on the market the products of its members. In order to safeguard the objectives of the Derogation, buying of products from non-members should remain ancillary. Buying products from non-members would remain ancillary if in normal circumstances, a PO buys no more than 25% of the production subject to contractual negotiations over a period of a year. There can be however exceptional situations (linked e.g. to the weather conditions, diseases) where exceeding this level could be justified without undermining the ancillary character of this activity.
- (62) All conditions of the Derogation as set out in Articles 169-171 of the CMO Regulation shall be complied with also with respect to quantities bought in from non-members. In particular, those volumes shall be included in the volumes subject to the contractual negotiations for the purposes of ensuring compliance with the thresholds of 15% of the total national production for beef and veal and arable crops sectors and of 20% of the relevant market applicable to the olive oil sector.

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<sup>42</sup> Paragraph 1, first sub-paragraph of Articles 169-171 of the CMO Regulation.

<sup>43</sup> Paragraph 2(d) of Articles 169-171 of the CMO Regulation.

<sup>44</sup> A non-member can be either a producer who is not member of the PO or a trader. The non-members do not directly participate in the contractual negotiations carried out by a PO on behalf of its members, i.e. PO negotiates independently from non-members. The non-member products are bought by a PO from non-members separately, these negotiations with non-members do not form part of the contractual negotiations and thus do not benefit from the Derogation.

- (63) **Example** of the application of the Derogation to contractual negotiations by a PO on behalf of its members covering products of non-member producers:

**Situation:** Fifteen small barley producers established a PO in order to reach sufficient production volumes necessary for the negotiation of a supply contract with a large regional starch manufacturing company. The producers provide the PO with the entirety of their production. The months of April and May were very dry in one of the parts of the region concerned, and the yield of the producers concerned dropped by 25%. In August the PO would thus not be able to supply to the starch manufacturing company at hand the agreed volumes. In order to avoid that the PO loses the starch manufacturing company as customer, it buys the lacking volumes of barley in the market from a non-member producer. The volume bought from the non-member represented 17% of the volume to be supplied to the starch manufacturing company on the basis of the contract negotiated by the PO.

**Analysis:** The proportion of products provided by members of the PO forms a large majority of products subject to the contractual negotiations by the PO on behalf of its 15 members with the starch manufacturing company. The total volume subject to the contractual negotiations at hand, including the volumes originating from a non-member, represent 2.2% of the total national production, i.e. the threshold of 15% of the total national production in the field of arable crops is respected. As all other conditions set out in Article 171 of the CMO Regulation are also complied with, the overall contractual negotiations of the PO may benefit from the Derogation.

#### **2.4.3 The Significant Efficiency Test**

- (64) The text of Articles 169, 170 and 171 of the CMO Regulation provides for all three sectors of olive oil, beef and veal, and arable crops that "*[a] producer organisation fulfils the objectives mentioned in this paragraph provided that the pursuit of these objectives leads to the integration of activities and this integration is likely to generate significant efficiencies<sup>45</sup> so that the activities of the producer organisation overall contribute to the fulfilment of the objectives of Article 39 of the Treaty.*
- (65) The Derogation thus requires that a PO, which carries out contractual negotiations: 1) integrates activities and 2) that these activities are likely to generate significant efficiencies to ensure that activities of the PO overall contribute to the fulfilment of the CAP objectives.
- (66) Indeed, joint sales activities and other joint activities by producers may have different impacts on the fulfilment of the CAP objectives.
- (67) Agreements between agricultural producers to carry out jointly certain activities can lead to efficiencies and thus economic benefits in particular if they combine activities, skills or assets as a means to share risk, save costs, increase investments, pool know-

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<sup>45</sup> Emphasis added.

how, enhance product quality and variety, and launch innovation faster. Such activities can contribute to the fulfilment of the CAP objectives, possibly leading for instance to increases in productivity (e.g. because of access to better producing technologies through for instance joint procurement activities), to increased revenues for the producers (e.g. because of improvements in quality through better production or storage conditions acquired jointly) or to better availability of supplies (e.g. because of better storage or distribution systems procured or organised jointly).

- (68) Agreements between agricultural producers to carry out contractual negotiations may, however, restrict competition and ultimately impair the fulfilment of the CAP objectives. This might for example be the case if the producers conclude an agreement which fixes prices, reduces output or shares markets. Such agreements, while able to increase producers' earning, might jeopardise the fulfilment of other CAP objectives if they lead, for instance, to unreasonable prices for the consumer (because of increases in prices), to problems of availability of supplies (because of restrictions of supply) or to decreases in productivity (because the reduction in competition between the producers may decrease the incentive to increase productivity).
- (69) In situations where sales-related activities of a PO who jointly sells impair the fulfilment of certain CAP objectives, the generation of significant efficiencies can compensate these effects and ensure that the activities of the PO overall contribute to the fulfilment of the CAP objectives. Articles 169, 170 and 171 of the CMO Regulation thus require that:
- a. the PO integrates activities; and
  - b. these activities are likely to generate significant efficiencies so that the activities of the PO overall contribute to the fulfilment of the CAP objectives.

Only if the PO fulfils this test (hereinafter referred to as the "Significant Efficiency Test") may the PO benefit from the Derogation.

- (70) The Significant Efficiency Test requires:
- a. the identification of activities which are integrated by the PO, i.e. which are carried out by the PO on behalf of its members. Integration can be done by a PO either by carrying out directly the activities or by outsourcing these activities to third parties. A PO may outsource certain activities to 3rd parties and still take these activities into account for the purpose of ensuring compliance with the Significant Efficiency Test (e.g. transportation services from third party hauliers).<sup>46</sup>

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<sup>46</sup> Outsourcing of activities by a recognised PO however needs to be, in line with Article 155 of the CMO Regulation, ex ante permitted by Member States. Outsourcing of production is excluded. A PO must remain responsible for ensuring the carrying out of the outsourced activity and for overall management,

- b. the finding that these activities are likely to generate efficiencies. This concerns the nature of the activities (i.e. whether the activity is likely to create efficiencies by its nature). It may also concern the degree of development of the PO (the PO may have committed itself to invest in such activities but the investment may require some time to fully materialise while the PO already negotiates contracts on behalf of its members); and
- c. the finding that such efficiencies are likely to be significant enough so that the PO (through all its activities) contributes to the fulfilment of the CAP objectives<sup>47</sup>.

(71) As described above in paragraph (41), a PO can be a member of another PO (a so-called "second-tier PO") which sells the output of the first PO. The contractual negotiations of the second-tier PO may benefit from the Derogation provided it complies with its conditions. When assessing whether the PO complies in particular with the Significant Efficiency Test, the efficiency-enhancing activities of the first-tier PO (e.g. collection and transport of products) can be taken into account for the accounting of efficiencies in the second-tier PO/APO under the Derogation.

(72) A PO can assess whether it complies with the Significant Efficiency Test through a simplified method provided by the legislator. If the PO does not comply with the conditions of the simplified method, the PO may – in certain circumstances - carry out an alternative method in order to assess whether it complies with the Significant Efficiency Test.

### **The simplified method**

(73) The third subparagraph of paragraph 1 of each of the Articles 169, 170 and 171 sets out a method to assess compliance with the Significant Efficiency Test ("simplified method"). The Derogation states<sup>48</sup> that the Significant Efficiency Test can be met if:

- a. The PO carries out at least one of the potentially efficiency enhancing activities listed in Articles 169, 170 and 171 of the CMO Regulation<sup>49</sup>; and

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control and supervision of the commercial arrangement for the carrying out of the activity. Further details concerning outsourcing are set out in Commission Delegated Regulation (EU) No ....

<sup>47</sup> As this efficiency test relies on the fulfilment of CAP objectives in the light of the specific legal basis provided by Articles 39 and 42 TFEU for competition rules in the production and trade of agricultural products, it is different from any efficiency test that would be applied in competition enforcement in other sectors.

<sup>48</sup> Paragraph 1, sub-paragraph 3 point (a) and (b) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>49</sup> These activities are:

- (i) joint distribution, including joint selling platform or joint transportation;
- (ii) joint packaging, labelling or promotion; the first two activities are only considered for the



- b. These activities are significant in terms of volume of the product concerned and costs of production and placing of the product on the market. If these activities are significant enough, it is assumed that they are likely to generate significant efficiencies. Such efficiencies can be deemed to compensate any possible impairment of the fulfilment of CAP objectives by contractual negotiations. As a consequence, the activities of the PO overall can be assumed to contribute to the fulfilment of the CAP objectives.

(74) This simplified method is not applicable in a number of situations. First, it is not excluded that activities other than the ones listed in Articles 169, 170 and 171 of the CMO Regulation create efficiencies and, in the individual case these activities create such significant efficiencies, that the activities of the producer organisation overall contribute to the fulfilment of the CAP objectives. Such a situation is not covered by the simplified method and would require a case-by-case analysis explained in paragraph (77) to (80).

(75) Secondly, the simplified method does not concern situations where the PO may have committed itself to invest in efficiency-enhancing activities but the investment requires some time to fully materialise. Such a situation is not covered by the method (which relies on activities already carried out by the PO) and would require a case-by-case analysis explained in paragraph (77).

The simplified method requires the identification of activities among those listed in Articles 169, 170 and 171 of the CMO Regulation and the assessment of significance of volumes and costs covered by these activities. The following three boxes present for each of the three sectors situations where such activities represent significant volumes of product concerned and significant costs of the production and placing of the product on the market so that the PO can benefit from the Derogation.

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- olive oil sector;
  - (iii) joint organising of quality control;
  - (iv) joint use of equipment or storage facilities;
  - (v) joint processing; this activity is only considered for the olive oil sector;
  - (vi) joint management of waste directly related to the production of the product; this activity is only considered for the olive oil and beef and veal sectors;
  - (vii) joint procurement of inputs.

## ***Olive oil sector***

### ***Application of the Significant Efficiency Test***

Description of joint activities of Article 169 of the CMO Regulation, which are likely to generate significant efficiencies in the context of the simplified method.

#### ***i. Joint processing***

1. **Joint processing** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO processes the majority of the volume of olives harvested by its members to produce olive oil in an olive oil mill. The establishment of an olive oil mill requires a significant investment. Processing olives into olive oil normally involves several stages such as: cleaning the olives, pressing the olives and filtering of the olive oil and other processes. In such situation, where the joint processing activities of a PO produce the majority of olive oil commercialised by the PO, the PO is likely to generate significant efficiencies compared to the situation where members would individually seek to process their olives and therefore would fulfil the conditions of the simplified method.

#### ***ii. Joint packaging, labelling or promotion***

2. **Joint packaging/bottling and labelling** of olive oil is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out these activities with respect to the majority of olive oil commercialised in an olive oil mill. Joint packaging/bottling and labelling normally requires a significant investment for the acquisition of the necessary technology/machinery. In such situation, where the activities of joint packaging/bottling and labelling of a PO cover the majority of olive oil commercialised by the PO, the PO is likely to generate significant efficiencies and therefore would fulfil the conditions of the simplified method.
3. **Joint promotion** is likely to generate significant efficiencies in certain situations. For example, this is the case if a PO develops and commercialises a value-added product. In this context, the joint promotion is the marketing part of an integrated strategy to sell such a value added product and the joint promotion will cover all volumes commercialised by the PO. The PO can differentiate its product based, for instance, on the production methods adopted (e.g. to produce organic olive oil). The PO sets out and ensures the compliance with the set of specifications of the product: this involves e.g. developing the adequate set of specifications, production process planning and quality control in respect of such specifications, procuring inputs needed to respect the specifications etc. The costs of such an integrated approach both for the PO and for its members to comply with the specifications are significant. In such a situation, the PO is likely to generate significant efficiencies and therefore would fulfil the conditions of the simplified method.

**For consultation:** *Are there situations in which joint promotion, for instance the promotion of generic products without further integrated activities, entails significant costs and volumes and is likely to generate significant efficiencies in the olive oil sector? Please describe.*

### ***iii. Joint organising of quality control***

4. **Joint organising of quality control** is likely to generate significant efficiencies in certain situations. For example, this is the case when a PO ensures consistent quality of the products produced by its members either because this is required by regulation or by an established standard e.g. if the PO and its members aim to meet the requirements of buyers. The PO helps achieving quality firstly, through advice and support on production processes. In doing so, the PO provides to the producers field services like advice on improved methods of applying phyto-sanitary agents, other chemicals and fertilizers, on the application of better production techniques, the assistance with on-farm production problems, regulatory and inspection issues which help the producer to achieve a quality product. Secondly, the PO also carries out testing (own or outsourced) to verify the quality of the olive oil (laboratory testing of acidity and presence of pesticides, testing of organoleptic qualities etc.) produced by its members and that the PO will commercialise. Such testing is done either to demonstrate to independent certifiers/controllers that products meet the regulatory or standard requirements or/and to prove to the buyer(s) that the products meet its/their requirements. The costs of all these activities are significant if these activities cover the majority of the olive oil commercialised by the PO. In such a situation, the PO is likely to generate significant efficiencies because it would be significantly more costly for an individual member to achieve the same result on his/her own. As a result, in such a situation the PO is likely to generate significant efficiencies and therefore would fulfil the conditions of the simplified method.

### ***iv. Joint distribution***

Joint distribution can cover the following activities: joint transportation, setting up a distribution centre or a selling infrastructure, or/and organising a selling platform.

5. **Joint transportation** is likely to generate significant efficiencies in certain situations. For example, this might be the case if the PO organises transport services from olive groves to the processing site (olive mill) for the majority of olive oil commercialised by the PO or if the PO organises transport services from several olive mills to a packaging/ bottling and labelling site for the majority of olive oil commercialised by the PO. Transport costs represent a significant part of the cost of producing and placing the product on the market<sup>50</sup>. In this context, the PO can operate the transportation business more efficiently compared to what would be done by members on an individual basis. For example, the PO can achieve economies of scale by transporting larger volumes, consolidating the number of shipments, reducing unloading and handling costs. Therefore, in such a situation, the PO is likely to achieve significant cost reductions and

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<sup>50</sup> **For consultation:** Please indicate how much transportation costs represent as a percentage of costs of production and placing of olive oil on the market.

generate significant efficiencies compared to what would be done by members on an individual basis and, as a result, the PO is likely to generate significant efficiencies and therefore would fulfil the conditions of the simplified method.

**6. Setting up a distribution centre or a selling infrastructure, or/and organising a selling platform**

**For consultation:** *Are there situations in which setting up a distribution centre or a selling infrastructure, or/and organising a selling platform (including an on-line selling platform) entails significant costs and volumes and is likely to generate significant efficiencies in the olive oil sector? Please describe.*

**v. Joint use of equipment or storage facilities**

7. **Joint use of equipment** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in significant agricultural machinery (e.g. harvesting machines, applicators for phytosanitary agents, fertilisers, pesticides) and ensures proper use and maintenance of it. In such a case, the PO initially bears investment costs by purchasing the equipment (new or used) to produce the olive oil. The PO afterwards bears other costs concerning the maintenance and ensuring proper use of the equipment (e.g. training). The initial investment and other costs in equipment entail significant costs if they concern significant volumes. In this context, the costs of using the equipment are significant if significant parts of the volumes commercialised by the PO are produced with the help of the jointly owned equipment. Therefore, in case the equipment is used to produce the majority of the volume of olive oil commercialised by the PO, the PO is likely to generate significant efficiencies. New equipment/machinery is often necessary to increase productivity as well as to ensure that the product meets market demands. However, some producers cannot afford new equipment due to the high investments needed, therefore the joint use of equipment can save costs for the members and increase their productivity. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Is there other significant equipment which would be acquired by a PO for joint use by its members and which entails significant costs and volumes and is likely to generate significant efficiencies? Please describe.*

8. **Joint use of storage** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in the storage facilities and ensures proper use and maintenance of it. The PO bears initial investment costs in storage by purchasing or planning and building the facilities. The PO bears other investment costs in storage by upgrading the facilities. Investments in storage entail significant costs if they concern significant volumes. The costs of using the storage are also significant if significant parts of the volumes of the PO are stored through these facilities. In case the storage activities cover the majority of olive oil commercialised by the PO and are thus significant in terms of volumes, the PO is likely

to generate significant efficiencies. The provision of storage facilities by the PO can lead to lower costs compared to the situation where members have to invest individually in storage. The possibility to store the product without immediately delivering it to a third party, possibly for a longer period and possibly in larger quantities, enables the members of the PO to sell their products when the price is more favourable and not necessarily at the time of the harvest when the supply is the highest. It could also address the imbalances in supply created by the changing volumes of olives harvested over different years. In such a situation, the PO would fulfil the conditions of the simplified method.

**vi. Joint management of waste directly related to the production of olive oil**

**For consultation:** *Are there situations in which joint management of waste by a PO is carried out on its own (without joint processing) and which entail significant costs and volumes and is likely to generate significant efficiencies in the olive oil sector? Please describe.*

**vii. Joint procurement of inputs**

9. **Joint procurement of inputs** is likely to generate significant efficiencies in certain situations. For example this can be the case if the procurement is done for significant volumes as then the PO can obtain significant discounts, better delivery terms and/or credit terms compared to what an individual producer would obtain. Besides, purchasing these inputs on its account, the PO may ensure proper storage and/or delivery of these products. When a PO procures for its members fertilisers, phyto-sanitary agents, pesticides or energy (fuel, electricity), these inputs represent significant costs<sup>51</sup>. If a PO carries out procurement for a volume corresponding to what is needed to produce the majority of olive oil jointly commercialised, the PO is likely to generate significant efficiencies. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there other significant inputs (including services) which would be purchased by a PO for its members, which entail significant costs and volumes and whose joint procurement is likely to generate significant efficiencies in the olive oil sector? Please describe.*

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<sup>51</sup> In Greece, Italy and Spain the costs of fertilizers represented on average 18% of the operating costs (farms specialised in olive oil production) in 2010, pesticides 14% and fuel and energy costs 27%, based on the data of the report "EU olive oil farms report based on FADN data", [http://ec.europa.eu/agriculture/rca/pdf/Olive\\_oil%20report2000\\_2010.pdf](http://ec.europa.eu/agriculture/rca/pdf/Olive_oil%20report2000_2010.pdf), p.57-76.

**For consultation:** *Please provide further data on other costs if available.*

## ***Beef and veal sector***

### ***Application of the Significant Efficiency Test***

Description of joint activities of Article 170 of the CMO Regulation, which are likely to generate significant efficiencies in the context of the simplified method

#### ***i. Joint distribution***

1. **Joint distribution** can cover the following activities: joint transportation, setting up a distribution centre or a selling infrastructure, or/and organising a selling platform.
2. **Joint transportation** is likely to generate significant efficiencies in certain situations. For example, this is the case if the PO organises transport services from producing points to the buyer or to the processing site for the majority of the livestock commercialised by the PO. In this context, the PO can operate the transportation business more efficiently compared to what would be done by members on an individual basis. For example, the PO can achieve economies of scale by transporting larger volumes, consolidating the number of shipments, reducing unloading and handling costs. Therefore, in such a situation, the PO is likely to achieve significant cost reductions and generate significant efficiencies compared to what would be done by members on an individual basis and the PO would fulfil the conditions of the simplified method.
3. **Organising a selling platform** is likely to generate significant efficiencies in certain situations. For example, this is the case if the PO develops a physical market or auction platform for selling livestock. In such a situation, the PO invests in facilities to present livestock and allow trade of the livestock. This requires significant costs of investments in the facilities and in running the facilities if this covers large volumes and regular trades. Achieving such volumes and trades and making the corresponding investment, means that the PO represents the main channel of sales for its members, i.e. it sells the majority of the livestock of its members (in volume). This ensures economies of scale for the sales of the livestock by allowing producers to reach a larger number of buyers and more quickly than if they were doing it individually. It can also reduce transaction costs for the sellers and buyers. Therefore in such a situation, the PO is likely to generate significant efficiencies compared to what would be done by members on an individual basis and the PO would fulfil the conditions of the simplified method.
4. **Setting up a distribution centre** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in a distribution facility like a calf collection centre and ensures proper use and maintenance of it. The PO bears initial investment costs in the distribution centre by purchasing or planning and building the facility. The PO bears other investments by upgrading the facility. Initial and other investments entail significant costs if they concern significant volumes. The costs of running the facility are also significant when significant parts of the volumes of the PO are distributed through this facility. In case the distribution 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. This ensures economies of scale for the sales of the livestock by allowing producers to reach a larger number of buyers and more quickly than if they were doing it individually. It can also reduce transaction costs for the sellers and buyers. Therefore, in such a situation, the PO is likely to generate significant efficiencies compared to what would be done by members on an individual basis and the PO would fulfil the conditions of the simplified method.

***For consultation: Are there situations in which setting up a distribution centre or a selling infrastructure, or/and organising a selling platform (including an on-line selling platform) entails significant costs and volumes and is likely to generate significant efficiencies in the beef and veal sector. Please describe.***

### ***ii. Joint promotion***

5. **Joint promotion** is likely to generate significant efficiencies in certain situations. For example, this is the case if a PO develops and commercialises a value-added product. In this context, the joint promotion is the marketing part of an integrated strategy to sell such a value added product and the joint promotion activity is one of several activities carried out to implement this strategy. The PO can differentiate its product based, for instance, on the breed, feed, production system or the place of origin. The PO sets out and ensures compliance with the set of specifications of the product: this involves e.g. developing the adequate set of specifications, production process planning and quality control in respect of such specifications, procuring inputs needed to respect the specifications etc. The costs of such an integrated approach both for the PO and for its members to comply with the specifications are significant when it covers at least a majority of the volumes commercialised by the PO. In such a situation, the PO would fulfil the conditions of the simplified method.

***For consultation: Are there situations in which joint promotion, for instance the promotion of generic products without further integrated activities, entails significant costs and volumes and is likely to generate significant efficiencies in the beef and veal sector? Please describe.***

### ***iii. Joint organising of quality control***

6. **Joint organising of quality control** is likely to generate significant efficiencies in certain situations. For example, this is the case when a PO ensures consistent quality of the products produced by its members either because this is required by regulation or by an established standard required by buyers. The PO helps achieving quality firstly, through advice and support on production processes. In doing so, the PO provides services like advice on breed, improved feed, the application of better techniques to bring up the livestock, the assistance with on-farm production problems and regulatory and inspection issues for the producer to achieve a quality product. Secondly, the PO provides veterinary services (own or outsourced) to ensure the health of the product (vaccination and other prophylactic actions, disease surveillance, reproduction activities etc.) that is produced by its members and that the PO will commercialise. In addition, the PO carries out testing, either to demonstrate to independent certifiers/controllers

that the products meet the regulatory or standard requirements, or/and to prove to the buyer(s) that the products meet its/their requirements. The costs of all these activities are significant if these activities cover the majority of livestock commercialised by the PO. In such a situation, the PO is likely to generate significant efficiencies because it would be significantly more costly for an individual member to achieve the same result on his/her own and, as a result, the PO would fulfil the conditions of the simplified method.

**iv. Joint use of equipment or storage facilities**

7. **Joint use of equipment** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in the significant equipment (e.g. machinery for producing feed like harvester, grinder) and ensures proper use and maintenance of it. In such a case, the PO initially bears investment costs by purchasing the equipment (new or used) to produce the livestock. The PO afterwards bears other costs concerning the maintenance and ensuring proper use of the equipment (e.g. training). The initial investment and other costs in equipment entail significant costs if they concern significant volumes. In this context, the costs of using the equipment are significant when significant parts of the volumes commercialised by the PO are produced with the help of the jointly owned equipment. Therefore, in case the equipment is used to produce the majority of the volume of live stock commercialised by the PO, the PO is likely to generate significant efficiencies. New equipment/machinery is often necessary to increase productivity as well as to ensure that the product meets market demands. However, some producers cannot afford new equipment due to the high investments needed, therefore the joint use of equipment can save costs for the members and increase their productivity. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation: Is there other significant equipment which would be acquired by a PO for joint use by its members and which entails significant costs and volumes is likely to generate significant efficiencies? Please describe.**

8. **Joint use of storage** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in the storage facilities (e.g. for feed) and ensures proper use and maintenance of it. The PO bears initial investment costs in storage by purchasing or planning and building the facilities. The PO bears other investments in storage by upgrading the facilities. Initial and other investments in storage entail significant costs if they concern significant volumes. The costs of using the storage are also significant when significant parts of the volumes of the PO are stored through these facilities. 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. The provision of storage facilities by the PO can lead to lower costs compared to the situation where members have to invest individually in storage. The possibility to store the product without immediately delivering it to a third party, possibly for a longer period and possibly in larger quantities, enables the members of the PO to sell their products when the price is



more favourable and not necessarily at the time of the harvest when the supply is the highest. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there other significant storage facilities (besides for the feed as described above) which could be set up by a PO for joint use by its members and which entail significant costs and volumes and are likely to generate significant efficiencies? Please describe.*

**v. Joint management of waste directly related to the production of live cattle**

9. **Joint management of waste** is likely to generate significant efficiencies in certain situations. For example, this is the case if the PO ensures the removal, storage and reuse of the waste in a sustainable way (for energy and for biogas production, for fertilizers etc.) for the majority of the waste produced by the livestock commercialised by the PO. In this context, the PO can operate the waste management more efficiently compared to what would be done by members on an individual basis. For example, the PO can achieve economies of scale by transporting larger volumes of waste, consolidating the number of shipments, reducing unloading and handling costs. Therefore, in such a situation, the PO is likely to achieve significant cost reductions and generate significant efficiencies compared to what would be done by members on an individual basis and therefore, the PO would fulfil the conditions of the simplified method.

**vi. Joint procurement of inputs**

10. **Joint procurement of inputs** is likely to generate significant efficiencies in certain situations. For example, this can be the case if the procurement is done for significant volumes as then the PO can obtain significant discounts, better delivery terms and/or credit terms compared to what an individual producer would obtain. Besides purchasing these inputs on its account, the PO may ensure proper storage and/or delivery of these products to the members. When a PO procures for its members feed, purchased animals or other inputs like fuel and electricity, these inputs represent significant costs<sup>52</sup>. If a PO carries out procurement for a volume corresponding to what is needed to produce the majority of the livestock jointly commercialised, the PO is likely to generate significant efficiencies. In such a situation the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there other significant inputs (including services) which would be purchased by a PO for its members, which entail significant costs and volumes and whose*

<sup>52</sup> In the EU-27 the costs of feed represented 41% of the operating costs in 2011 for breeders and fatteners,<sup>52</sup> the cost of the purchased animals 22% and fuel and energy costs 7%, based on the report "EU beef farms report 2012 based on FADN data".  
[http://ec.europa.eu/agriculture/rca/pdf/beef\\_report\\_2012.pdf](http://ec.europa.eu/agriculture/rca/pdf/beef_report_2012.pdf), p.69.

**For consultation:** *Please provide further data on other costs if available.*

*joint procurement is likely to generate significant efficiencies in the beef and veal sector? Please describe.*

### **Arable crops sector**

#### **Application of the Significant Efficiency Test**

Description of joint activities of Article 171 of the CMO Regulation, which are likely to generate significant efficiencies in the context of the simplified method

##### ***i. Joint distribution***

1. **Joint distribution** can cover the following activities: joint transportation, setting up a distribution centre or a selling infrastructure, and/or organising a selling platform.
2. **Joint transportation** is likely to generate significant efficiencies in certain situations. For example, this is the case if the PO organises transport services (road or rail transportation, or maritime shipping) from harvesting points to the buyer's storage or processing site for the majority of the volumes of crops commercialised by the PO. In this context, the PO can operate the transportation business more efficiently compared to what would be done by members on an individual basis. For example, the PO can achieve economies of scale by transporting larger volumes, consolidating the number of shipments, reducing unloading and handling costs. Therefore in such a situation, the PO is likely to achieve significant cost reductions and generate significant efficiencies compared to what would be done by members on an individual basis and therefore, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there situations in which setting up a distribution centre or a selling infrastructure, or/and organising a selling platform (including an on-line selling platform) entails significant costs and volumes and is likely to generate significant efficiencies in the arable crops sector? Please describe.*

##### ***ii. Joint promotion***

3. **Joint promotion** is likely to generate significant efficiencies in certain situations. For example, this is the case if a PO develops and commercialises a value-added product. In this context, the joint promotion is the marketing part of an integrated strategy to sell such a value added product and the joint promotion activity is one of several activities carried out to implement this strategy. The PO can differentiate its product based for instance on the protein content, the seeds used, the use of fertilizers, the crop's moisture content and size on delivery or the place of origin. The PO sets out and ensures the compliance with the set of specifications of the product. This involves e.g. developing the adequate set of specifications, production process planning and quality control in respect of such specifications, procuring inputs needed to respect the specifications etc. The costs of such an integrated approach both for the PO and for its members to comply with the specifications are significant when it covers at least a

majority of the volumes commercialised by the PO. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there situations in which joint promotion, for instance the promotion of generic products without further integrated activities, entails significant costs and volumes and is likely to generate significant efficiencies in the arable crop sector? Please describe.*

### **iii. Joint organising of quality control**

4. **Joint organising of quality control** is likely to generate significant efficiencies in certain situations. For example, this is the case when a PO ensures consistent quality of the products produced by its members either because this is required by regulation or by an established standard required by buyers. The PO helps achieving quality firstly, through advice and support on production processes. In doing so, the PO provides field services like advice on improved methods of applying chemicals and fertilizers, the application of better techniques e.g. ridging, fertilizing, transplanting, pest control etc., or/and assisting with on-farm production problems and regulatory and inspection issues for the producer to achieve a quality product. Secondly, the PO also carries out laboratory testing (own or outsourced) to verify the quality of the crop (protein, moisture, seed size, impurities etc.) that is produced by its members and that the PO will commercialise. Such testing is done either to demonstrate to independent certifiers/controllers that the products meet the regulatory or standard requirements or/and to prove to the buyer(s) that the products meet its/their requirements. The costs of all these activities are significant if these activities cover the majority of the volume of crops commercialised by the PO. In such a situation, the PO is likely to generate significant efficiencies because it would be significantly more costly for an individual member to achieve the same result on his/her own. Therefore, the PO would fulfil the conditions of the simplified method.

### **v. Joint use of equipment or storage facilities**

5. **Joint use of equipment** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in significant agricultural machinery (such as a harvester or a dryer) and ensures proper use and maintenance of it. In such a case, the PO initially bears investment costs by purchasing the equipment (new or used) to produce the arable crops or/and manage the harvested crop. The PO afterwards bears other costs concerning the maintenance and ensuring proper use of the equipment (e.g. training). The initial investment and other costs in equipment entail significant costs if they concern significant volumes. In this context, the costs of using the equipment are significant if significant parts of the volumes commercialised by the PO are produced with the help of the jointly owned equipment. Therefore in case the equipment is used to produce the majority of the volume of crops commercialised by the PO, the PO is likely to generate significant efficiencies. New equipment/machinery is often necessary to increase productivity as well as to ensure that the product meets market demands. However, some producers cannot afford new equipment due to the high investments needed, therefore the joint

use of equipment can save costs for the members and increase their productivity. In such a situation, the PO would fulfil the conditions of the simplified method.

6. **Joint use of storage** is likely to generate significant efficiencies in certain situations. For example, this can be the case where the PO carries out the necessary investment in the storage facilities and ensures proper use and maintenance of it. The PO bears initial investment costs in storage by purchasing or planning and building the facilities. The PO bears other investment costs in storage by upgrading the facilities. Investments in storage entail significant costs if they concern significant volumes. The costs of using the storage are also significant if significant parts of the volumes of the PO are stored through these facilities. In case the storage activities cover the majority of crops commercialised by the PO and are thus significant in terms of volumes, the PO is likely to generate significant efficiencies. The provision of storage facilities by the PO can lead to lower costs compared to the situation where members have to invest individually in storage. The possibility to store the product without immediately delivering it to a third party, possibly for a longer period and possibly in larger quantities, enables the members of the PO to sell their products when the price is more favourable and not necessarily at the time of the harvest when the supply is the highest. In such a situation, the PO would fulfil the conditions of the simplified method.

**vi. Joint procurement of inputs**

7. **Joint procurement** of inputs is likely to generate significant efficiencies in certain situations. For example, this can be the case if the procurement is done for significant volumes as then the PO can obtain significant discounts, better delivery terms and/or credit terms compared to what an individual producer would obtain. In addition to purchasing these inputs on its account, the PO may ensure proper storage and/or delivery of these products. When a PO procures for its members fertilisers, pesticides or energy (fuel, electricity), these inputs represent significant costs<sup>53</sup>. If a PO carries out procurement for a volume corresponding to what is needed to produce the majority of crops jointly commercialised, the PO is likely to generate significant efficiencies. In such a situation, the PO would fulfil the conditions of the simplified method.

**For consultation:** *Are there other significant inputs (including services) which would be purchased by a PO for its members, which entail significant costs and volumes and whose joint procurement is likely to generate significant efficiencies in the arable crop sector? Please describe.*

<sup>53</sup> In the EU-27 the costs of fertilizers represented for example for wheat, durum wheat, barley and maize on average 24% of the operating costs in 2011, pesticides 11% and fuel and energy costs 17%, based on the data of the report "EU cereal farms report 2013 based on FADN data", [http://ec.europa.eu/agriculture/rca/pdf/cereal\\_report\\_2013\\_final.pdf](http://ec.europa.eu/agriculture/rca/pdf/cereal_report_2013_final.pdf), p.26-79.

**For consultation:** *Please provide further data on other crops if available.*

- (76) Finally, if a PO does not meet the conditions set out in the simplified method, it can demonstrate through an alternative method that it still fulfils the Significant Efficiency Test.

### **The alternative method**

- (77) If a PO does not comply with the conditions of the simplified method it may carry out an alternative method in order to assess whether it complies with the Significant Efficiency Test. This may be because the simplified method could not be complied with but the PO considers that it nevertheless fulfils the Significant Efficiency Test. It may also be because the PO is in a situation not covered by the simplified method: the PO may carry out activities not considered in the simplified method or the PO may also not yet be carrying out efficiency-enhancing activities notably in cases where new POs are being created, where POs intend to develop new activities of integration, etc.
- (78) The alternative method requires assessing all the activities of the PO and assessing whether some activities are likely to generate significant efficiencies so that the PO overall contributes to the fulfilment of the CAP objectives. These guidelines provide some guidance on the alternative method without covering all possible aspects of an assessment under the alternative method given its case-by-case nature.
- (79) Some activities other than the ones listed in paragraph 1(a) of Articles 169, 170 and 171 of the CMO Regulation may create efficiencies. In such cases, it is necessary to assess on the basis of the facts of the specific situation at hand whether such activities of a PO are likely to generate significant efficiencies so that these activities overall contribute to the fulfilment of the CAP objectives<sup>54</sup>.

**For consultation:** *It appears that POs may carry out certain activities not listed in paragraph 1(a) of Articles 169, 170 and 171 of the CMO Regulation. For instance some POs provide training services (e.g. to improve productivity) or financial support services (e.g. insurance). Are there situations in which these and others services not listed in paragraph 1(a) of Articles 169, 170 and 171 of the CMO Regulation are likely to generate significant efficiencies?*

- (80) The alternative method may also address a situation where a PO has committed itself to invest in efficiency-enhancing activities but the investment requires some time to fully materialise while the PO already jointly sells to establish its presence on the market and ensure the viability of the investments it makes. In such circumstances, it would be necessary for the PO to demonstrate that it is financially committed to carry out the activity and that it is only a matter of time before it effectively carries out the

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<sup>54</sup> If the elements of the simplified method in terms of volume and costs as described above are complied with, it is likely that the Significant Efficiency Test is fulfilled in such a situation as well. If not, the Significant Efficiency Test would need to be assessed on the basis of the facts of the specific situation at hand in order to ensure that activities of a PO generate significant efficiencies so that these activities overall contribute to the fulfilment of the CAP objectives.

activity due to inevitable delays in implementation (e.g. building a facility). If the PO is able to demonstrate such commitment, it is necessary to assess on the basis of the facts of the specific situation at hand whether such new activities of a PO generate significant efficiencies so that these activities overall contribute to the fulfilment of the CAP objectives<sup>55</sup>. If the case at hand concerns activities listed in paragraph 1(a) of Articles 169, 170 and 171 of the CMO Regulation, the assessment can be done like the assessment under the simplified method based on the type and significance (in terms of volume and costs) of the planned activities. If the case at hand concerns activities not listed in paragraph 1(a) of Articles 169, 170 and 171 of the CMO Regulation, the assessment is case-specific. If in practice the activity ultimately cannot be carried out because of an event beyond the control of the PO, the PO may still benefit from the Derogation until a necessary delay has passed after the materialisation of this event for stopping the contractual negotiations impairing the CAP objectives (see arable crops example in section 3.3.).

#### **2.4.4 Conditions on the relations between the PO and its producer members**

- (81) The Derogation does not depend on whether there is or there is not a transfer of ownership of the product(s) concerned by the producers to the PO as it applies to POs in both situations<sup>56</sup>.
- (82) However, the Derogation imposes two requirements as regards the relations between the PO and its members<sup>57</sup>:
- a. The producers concerned should not be members of any other PO which also negotiates such contracts on their behalf. In other words, it is required that the producer does not give the mandate to any other PO to carry out contractual negotiations with respect to its products jointly with those of other producers. The producer may however sell in parallel these products directly to the market and may also sell other products through another PO.
  - b. The negotiations by the PO may take place provided that the product concerned is not covered by an obligation to supply arising from the producer's membership in a cooperative which is not itself member of a PO in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in or derived from these statutes. Articles 169, 170 and 171 of the CMO Regulation cannot therefore be

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<sup>55</sup> If the elements of the simplified method in terms of volume and costs as described above are complied with, it is likely that the Significant Efficiency Test is fulfilled in such a situation as well. If not, the Significant Efficiency Test would need to be assessed on the basis of the facts of the specific situation at hand in order to ensure that activities of a PO generate significant efficiencies so that these activities overall contribute to the fulfilment of the CAP objectives.

<sup>56</sup> Paragraph 2(a) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>57</sup> Paragraph 2(e) and (f) of Articles 169, 170 and 171 of the CMO Regulation.

considered as basis for non-compliance with an existing supply obligation in cooperative structures.

#### **2.4.5 A cap on production subject to contractual negotiations**

- (83) The Derogation is subject to quantitative limits<sup>58</sup>.
- (84) In the sectors of beef and veal and of arable crops, the Derogation is applicable provided that the volume of product which is covered by contractual negotiations by a particular PO, and which is produced in any particular Member State, does not exceed 15 % of the total national production of each product referred to respectively in Articles 170(1)(a) and (b) and Articles 171(1)(a)-(l) of the CMO Regulation.
- (85) In the sector of olive oil, the Derogation is applicable only in case the volume of olive oil production which is covered by contractual negotiations by a particular PO, and which is produced in any particular Member State, does not exceed 20% of the relevant market, making a distinction between olive oil for human consumption and olive oil for other uses. These Guidelines provide details concerning the determination of the relevant market in the specific section concerning the olive oil sector.
- (86) Articles 169, 170 and 171 of the CMO Regulation refer for purposes of setting the caps on market power to production "in any particular Member State". Accordingly, if the negotiation by a PO on behalf of its members concerns supply in more Member States, the production volumes in each Member State should not exceed more than the 15% of the national production for beef and veal and arable crops and of 20% of the relevant market for olive oil.
- (87) The Commission published the volume of production of products concerned in Member States in the Official Journal of the European Union (OJ C 256, 7 August 2014, p. 1-4)<sup>59</sup>. This information is also available on the website of the Commission<sup>60</sup>.

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<sup>58</sup> Paragraph 2 (c) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>59</sup> Olive oil:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0807%2803%29&from=EN>  
Arable crops:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0807%2801%29&from=EN>  
Beef and veal:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0807%2802%29&from=EN>

<sup>60</sup> Olive oil: [http://ec.europa.eu/agriculture/olive-oil/legislation/index\\_en.htm](http://ec.europa.eu/agriculture/olive-oil/legislation/index_en.htm)  
Beef and veal: [http://ec.europa.eu/agriculture/beef-veal/policy-instruments/index\\_en.htm](http://ec.europa.eu/agriculture/beef-veal/policy-instruments/index_en.htm)  
Arable crops: [http://ec.europa.eu/agriculture/cereals/legislation/index\\_en.htm](http://ec.europa.eu/agriculture/cereals/legislation/index_en.htm)

#### **2.4.6 Notification obligation**

- (88) The Derogation requires<sup>61</sup> the notification by the PO to the competent authorities of the Member State in which it operates of the volume of production of products concerned covered by its negotiations on behalf of its members. The respective competent authorities are determined by each Member State.

*[Reference document to be published by the Commission]*

#### **2.5 Safeguards**

- (89) Paragraph 5 of Articles 169, 170 and 171 of the CMO Regulation sets out a safeguard mechanism, which provides competition authorities of Member States with powers to decide in an individual case that a particular negotiation by the PO should be either reopened or should not take place.
- (90) The competition authorities of Member States can carry out such intervention even if the quantitative thresholds (15% of the total national production of products in beef and veal and in arable crops sectors or 20% of the relevant market in olive oil sector) for negotiations by POs are fully respected.
- (91) The safeguard mechanism can be applied by the competition authority of a Member State in the following three situations:
- a. if it considers that it is necessary in order to prevent competition being excluded; or
  - b. if it finds that the product covered by the negotiations forms part of a separate market by virtue of the specific characteristics of the product or its intended use and that such collective negotiation would cover more than 15% of the total national production of such market<sup>62</sup>; or
  - c. if it finds that the CAP objectives are jeopardised.
- (92) In all three situations, the action of the competent competition authorities under Articles 169, 170 and 171 of the CMO Regulation does not have the character of a sanction for infringement of competition rules, but it is rather considered as a preventive measure.
- (93) Until a decision is adopted by the competent competition authority that negotiations should be reopened or that they should not take place, negotiations carried out by producer organisations in compliance with Articles 169, 170 and 171 of the CMO Regulation are regarded as not infringing Articles 169, 170 and 171 of the CMO

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<sup>61</sup> Paragraph 2 (g) of Articles 169, 170 and 171 of the CMO Regulation.

<sup>62</sup> This possibility applies only to the beef and veal and arable crops sectors, i.e. not to the olive oil sector, where only conditions under a. or c. are relevant.



Regulation. Accordingly, before the date of such decision, negotiations by producer organisations which meet the conditions in Articles 169, 170 and 171 of the CMO Regulation cannot be sanctioned under general EU competition law. However, following the decision by the competent competition authority that the negotiations in question should be reopened or that they should not take place, the Derogation is no longer available. As a consequence, if the PO after that date does not respect the decision of the competent competition authority and continues the negotiations or maintains the implementation of concluded contracts, proceedings under general competition law may be launched with respect to the PO's behaviour.

### **2.5.1. Exclusion of competition**

- (94) As regards the first situation, where the competent competition authority intervenes to prevent competition from being excluded, the sales/contracts of a PO negotiated on behalf of its members may fully comply with the conditions set out in Articles 169, 170 and 171 of the CMO Regulation, but contain clauses that restrict competition beyond what is necessary to achieve the concentration of supply, i.e. contractual negotiations (i.e. clauses not included as conditions in Articles 169, 170 and 171 of the CMO Regulation, for instance an exclusivity clause which could have anti-competitive effects in a market with a limited number of operators all having exclusivity conditions).
- (95) Where the competent competition authority intervenes to prevent competition from being excluded, it aims at protecting rivalry between producers and competitive processes. Both actual and potential competition<sup>63</sup> shall be considered in such analysis. The competition could be excluded if one of its most important parameters is fully eliminated in a given relevant market; this is in particular valid for price competition<sup>64</sup> or competition in respect of innovation. Further elements having impact on the analysis of the elimination of competition are *inter alia*: market shares in the broader context of the analysis of the actual competitors' capacity to compete and their incentives to do so<sup>65</sup>; reduction of competition brought about by the contractual negotiations concerned; capacity to implement and maintain price increases; barriers

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<sup>63</sup> E.g. Judgment of 28 February 2002, T-395/94, *Atlantic Container Line v Commission*, ECLI:EU:T:2002:49, paragraph 330.

<sup>64</sup> E.g. Judgment in *Metro v Commission*, 26/76, ECLI:EU:C:1977:167, paragraph 21: "*... However, although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded. The powers conferred upon the Commission under Article 85 (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market. ....*".

<sup>65</sup> It should be recalled in this context that the entities benefiting from the Derogation are subject to market power thresholds of 15% of the national production for beef and veal and arable crops as well as of 20% of the relevant market for olive oil.

to new entry. For further details concerning the assessment of the exclusion of competition see (by analogy) Section 3.5 of the Guidelines on the application of Article 81(3) of the Treaty [currently Article 101(3) TFEU]<sup>66</sup>.

- (96) If however, the supply contracts of a PO concluded on behalf of its members do meet the conditions in Articles 169, 170 and 171 of the CMO Regulation and these contracts do not contain clauses that would restrict competition beyond what is necessary to allow the concentration of supply foreseen by those articles, they do not infringe Article 101 TFEU.

### **2.5.2. Smaller relevant product market with anti-competitive effects**

- (97) As for the second situation, the competition authority may decide that negotiations should be reopened or should not take place if it finds:
- a. that the relevant product (not geographic) market for negotiations concerning the beef and veal or arable crops sector is smaller than what is defined in Articles 170 and 171 of the CMO Regulation;
  - b. that the negotiations in question would have an anti-competitive effect on these smaller markets.

This does not apply to the sector of olive oil, where the relevant market is not defined in Article 169 of the CMO Regulation.

### **2.5.3. CAP objectives are jeopardised**

- (98) The third situation, where the competition authority can intervene is linked to its findings that the CAP objectives are jeopardised by further integration activities of POs. This situation could materialise in cases where a PO has made a self-assessment based on the simplified method. Under that method, there is an assumption that if the relevant criteria are met, the PO's activities overall contribute to the fulfilment of CAP objectives. A competition authority may find that in practice this is not the case even if the criteria are met.
- (99) In case the negotiations by POs cover only one Member State, the safeguards will be applied by the National Competition Authority of that Member State. In case the negotiations by POs cover more than one Member State, the safeguards will be applied by the European Commission.

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<sup>66</sup> Communication from the Commission - Notice — Guidelines on the application of Article 81(3) of the Treaty [currently Article 101(3) TFEU], OJ C 101, 27.4.2004, p. 97.

### 3. Sector specific sections

#### 3.1. Olive oil

##### **3.1.1. Examples of application of the Derogation in the olive sector**

(100) This section of the guidelines addresses the practical application of the specific rules of the CMO Regulation in the agricultural sector of olive oil, by way of the examples below.

(101) **Example** of the assessment under Article 169 of the CMO Regulation of a PO active in the olive oil sector where the Derogation is applicable:

**Situation:** In a given region, several POs producing olive oil by processing the olives brought to them by their members have been created in parallel by a number of olive growers. The POs also purchase phyto-sanitary products, fertilisers, equipment etc. for their members, and ensure quality control of the olives production.

The POs have in turn created a second-tier PO to which they supply their entire production. The second-tier PO transports the different olive oils produced by the first-tier POs to its premises for blending and bottling (when not sold in bulk). The second-tier PO negotiates the supply contracts with retailers on behalf of its members, i.e. it carries out contractual negotiations. It also carries out marketing and promotion activities. It further provides phyto-sanitary advice and quality control to growers/members of the first-tier POs. Both the first-tier POs and the second-tier PO are recognised by the Member State concerned, in line with the requirements of the CMO Regulation. The volume of olive oil which is covered by contractual negotiations by the second-tier PO represents 17.4% of the relevant market. The second-tier PO, which carries out contractual negotiations, notified the volume of olive oil subject to contractual negotiations to the national authorities.

**Analysis:** The second-tier PO has been recognised as a PO or as an APO, depending on the rules applicable in the Member State concerned. The second-tier PO concentrates supply and places olive oil on the market. The overall structure of the first-tier POs and the second-tier PO carries out activities which are likely to generate efficiencies as listed in Article 169 of the CMO Regulation. The relevant activities in the first-tier POs are joint production, joint purchasing of inputs, joint quality control and the relevant activities in the second-tier PO are joint transportation, bottling, joint quality control, joint marketing and promotion. In line with the simplified method of the Significant Efficiency Test, these activities are likely to generate efficiencies. The activities also cover the totality of the volumes which are subject to contractual negotiations. It can be thus concluded that the Significant Efficiency Test would be complied with under the simplified method. The volume of olive oil which is covered by contractual negotiations by the second-tier PO does not exceed 20% of the relevant market. The volume of olive oil subject to contractual negotiations was notified to the national authorities. Thus the Derogation applies to the contractual negotiations activities of the second-tier PO.

(102) **Example** of the assessment under Article 169 of the CMO Regulation of a PO active in the olive oil sector where the Derogation is not applicable:

**Situation:** Several olive oil producers (olive oil mills) decide to jointly sell part of their olive oil production to several different bottling companies in bulk; they sell the remaining part of their respective production separately to other clients. The olive oil producers set up a PO to handle the contractual negotiations on their behalf with respect to several bottling companies. For the purpose of supply to one of the bottlers (the biggest customer), the PO outsources transportation services, which cover 30% of the total volume of olive oil subject to contractual negotiations by the PO. The transportation of olive oil to the other bottling companies is not carried out by the PO; the customers (the bottling companies) organise the transportation themselves.

**Analysis:** The only efficiency-enhancing activity carried out by the PO is joint transportation with respect to the supply of olive oil to one of the bottling companies. Joint transportation is listed in Article 169 of the CMO Regulation among activities which have the potential to generate significant efficiencies. In this case, joint transportation covers much less than 50% of the volume of olive oil subject to contractual negotiations by the PO. Under the Simplified Method, this does not cover sufficiently significant volumes of olive oil to meet the conditions of the Significant Efficiency Test. The transportation activities are not likely to generate significant efficiencies and the contractual negotiations carried out by the PO are therefore unlikely to comply with the Derogation.

### **3.1.2. Identification of the relevant market in the olive oil sector**

(103) The Derogation requires identifying the relevant product and geographic markets for the wholesale sale of olive oil so that POs can identify whether they comply with the market share ceiling set by the Derogation<sup>67</sup>.

(104) Relevant markets need to be assessed on a case by case basis and the Commission has provided guidance on how to identify relevant markets in its Notice on the definition of the relevant market<sup>68</sup>. It is not possible for the Commission to provide precise definitions of relevant markets for the olive oil sector but, in order to help producers implement the Derogation, these Guidelines provide some guidance specific to the sector based on the information available to the Commission at the time of adoption of these Guidelines<sup>69</sup>. Relevant markets may evolve in time due to *inter alia* market developments.

(105) The issue is to identify the relevant product and geographic markets for the wholesale sale of olive oil. In that market, sellers include essentially producers and traders while

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<sup>67</sup> See section 2.4.5 A cap on production subject to contractual negotiations.

<sup>68</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law OJ C 372, 9.12.1997, p. 5.

<sup>69</sup> This includes previous investigations by competition authorities (DG Competition of the European Commission and Spanish NCA cases) as well as information collected by the Commission from operators.

buyers include essentially traders, manufacturers, retailers, industrial customers and customers in the hotel and restaurant sector.

a) Relevant product market

(106) First of all, the relevant product market for olive oil would appear to be distinct from the product markets for other edible oils considering *inter alia* the differences in characteristics, prices and purposes of these products. Furthermore, it may not be necessary to identify separate markets for the different types of olive oil (extra virgin, virgin and other olive based oils<sup>70</sup>) having regard to the large degree of substitution between these categories. Also, taking into account the organisation of sales channels it may be appropriate to identify three separate markets:

- olive oil supplied to retailers;
- olive oil supplied to industrial customers, and
- olive oil supplied to customers in the hotel and restaurant sector.

Finally, it cannot be excluded that in the market of olive oil supplied to retailers, the supply of private labels and branded products form different product markets.

(107) The above described common elements of market segmentation do not exclude the identification of narrower product markets.

b) Relevant geographic market

(108) From a geographical point of view the relevant market for supply of olive oil would seem not to be narrower than national and would be possibly EEA wide with respect to all three sales channels, namely supply of olive oil to retail customers, industry and the hotel and restaurant sector.

### 3.2. Beef and veal sector

#### ***3.2.1 Examples of application of the Derogation in the beef and veal sector***

(109) This section of the guidelines addresses the practical application of the specific rules of the CMO Regulation in the agricultural sector of beef and veal by way of the examples below.

(110) **Example** of the assessment under Article 170 of the CMO Regulation of a PO active in the beef and veal sector where the Derogation is applicable:

**Situation:** A recognised PO jointly sells all (100%) of the cattle production of its members for the supply of live cattle for slaughter. The sale represents a 1.3% market share of the total national beef production in the Member State in question. In addition to joint sales, the PO organises the collection and transport of all (100%) cattle sold on behalf of its members for delivery to slaughterhouses, which represents 17% of the cost of production and placing of the product on the market. Further,

<sup>70</sup> Commission Implementing Regulation (EU) No 29/2012 of 13 January 2012 on marketing standards for olive oil, OJ L 12, 14.01.2012, p. 14 (as amended).

the PO procures for its members most of the animal feeding and medication that they use, which represents about 9% of the cost of production.

**Analysis:** The PO concentrates supply and places live cattle on the market. The PO carries out activities which are likely to generate efficiencies as listed in Article 170 of the CMO Regulation: first, joint transportation of cattle, secondly, joint procurement of inputs like feed and medication. The joint transportation of the PO covers more than half of the volumes commercialised by the PO (in this case 100% of the livestock) and the PO thus seems to comply with the Significant Efficiency Test under the simplified method. Regarding the joint procurement of inputs, no assessment is necessary as the PO seems to fulfil the conditions of the Significant Efficiency Test under the simplified method. The PO sells far less than 15% of the total national production of live cattle. Consequently, the Derogation applies to the contractual negotiations by the PO.

(111) **Example** of the assessment under Article 170 of the CMO Regulation of a PO active in the beef and veal sector where the Derogation is not applicable:

**Situation:** A recognised PO carries out joint sales of 80% of its members' cattle production for the supply of live cattle for slaughter. The sale represents a market share of 6% of the total national beef production in the Member State concerned. In addition to joint sales, the PO is organising joint promotion campaigns on behalf of its members in form of general advertisements in the local newspaper about its members' livestock. The joint promotion activity covers all the products sold jointly by the PO.

**Analysis:** The PO concentrates supply and places live cattle on the market. The PO carries out one activity which is likely to generate efficiencies as listed in Article 170 of the CMO Regulation: joint promotion. This activity is covering all the volume jointly sold, however, the joint activity does not seem to meet the conditions of the Significant Efficiency Test under the simplified method. In the current example the PO seems not to develop a value added product but only seems to promote the product of its members in form of general ads. Ultimately, the promotion activity is unlikely to create significant efficiencies on its own in this example and the Derogation is unlikely to apply to the contractual negotiations by the PO.

### 3.3. Arable crops

#### *3.3.1 Examples of application of the Derogation in the arable crops sector*

(112) This section of the guidelines addresses the practical application of the specific rules of the CMO Regulation in the agricultural sector of arable crops by way of the examples below.

(113) **Example** of the assessment under Article 171 of the CMO Regulation of a PO active in the arable crops sector where the Derogation is applicable:

**Situation:** "Golden Glow" is a PO of grain producers. The PO is established and recognised in Member State A and has some members in Member States B and C. Golden Glow was set up to provide transportation services to its members as the transportation costs are relatively high due to the remoteness of the selling points. On average 60% of the quantity contractually negotiated by the PO uses the joint transportation services (own or outsourced). Further, the PO engages in joint procurement of inputs especially of the fertilisers and the pesticides. Besides, it provides information services to its members like information on new seeds in the market, risk diversification including hedging etc.

Regarding the logistics services, the PO owns itself some lorries. However, these lorries only cover 9% of the transportation needs of its members. Therefore, the PO has signed contracts with two other companies, which are specialised in providing transportation services. The PO has notified the outsourcing request to the relevant national authority, which approved it. It submitted relevant explanations that outsourcing of transportation saves significantly costs as the investments in the trucks are high, the needs of the transportation in the arable crop sector are very cyclical (i.e. lots of transportation needed at harvest, otherwise the need is very low), maintenance of the lorries are high and having specialised drivers which are not employed all the time can be costly.

Further, Golden Glow had in 2014 the following share of the total national production. Member State A: common wheat 6.4%, barley 4%, oats 13.8 %, rapeseed 13.6%, field beans 2.3% and field peas 1%. In the Member States B and C the market share of Golden Glow is under 1% in each grain type. The members of the PO market on average 80% of their production through the PO. Members buy on average two thirds of their fertilisers and pesticides through the PO and these inputs represent on average 18% of the total variable cost of production and placing of the product on the market for all the crop types negotiated by the PO.

**Analysis:** Golden Glow is formally recognised by the national authority in A. The PO concentrates supply and places arable crops products on the market. The PO carries out activities which are likely to generate efficiencies as listed in Article 171 of the CMO Regulation, namely joint transportation and joint procurement of inputs. The joint transportation of the PO covers more than half of the volumes commercialised by the PO and the PO thus seems to comply with the Significant Efficiency Test under the simplified method. The assessment of the joint procurement of inputs is in this case not necessary as the conditions of the test for one joint activity are met. Last, the share of wheat, barley, oats, rapeseed, field beans and peas which is sold/contractually negotiated by the PO, does not exceed 15% of the total national production in the Member state A. As a conclusion, the Derogation applies to the contractual negotiations of the PO.

The PO provides information services, which are not listed in Article 171 of the CMO Regulation. It is not excluded that this activity is likely to generate efficiencies. However, in the current case it is not necessary to assess these services as the analysis

of joint transportation is sufficient for the Derogation to apply to the contractual negotiations of the PO.

- (114) **Example** of the assessment under Article 171 of the CMO Regulation of a PO active in the arable crops sector where the Derogation is not applicable:

**Situation:** "Stony Fields" is a PO active in the wheat and barley market in Member State A. The PO is recognised by a relevant national authority in A. The PO is selling wheat and barley of its members and of non-members. The share of the wheat produced by its members and which is covered by contractual negotiations by the PO, is 7% of the national production of wheat of the Member State A, respectively 8% of the relevant barley production. The market share of the PO in the market of A taking into account also the wheat and barley provided by the non-members, is respectively 19% and 17.2%. Besides carrying out the contractual negotiations on behalf of its members, Stony Fields intends to invest in a storage facility with some processing machines (i.e. drying and cleaning), which would cover 10% of its storage needs and about 1% of the total volume of the sold wheat by the PO (members and non-members product). Stony Fields has received a loan from a local bank to finance the facility. Currently the PO is assessing the different offers received from the different companies for building and for the equipment. The PO intends to be able to use the facility in 6-8 months.

Further, Stony Fields also sends weekly newsletters to its members as regards to the developments of the markets and relevant news for the wheat and producers.

**Analysis:** Stony Fields is a recognised PO and it concentrates supply and places arable crops products on the market. The PO does not carry out activities which are likely to generate efficiencies as listed in Article 171 of the CMO Regulation. The PO only intends to provide one potentially efficiency enhancing activity listed in the Article 171 in the future (storage). The Simplified Method for assessing the Significant Efficiency Test is thus not applicable. However, in the current example an alternative method could be carried out as described in paragraphs (74) to (80). In the current case, the PO has received a credit line from the bank and has received offers from different companies to build the storage facility. The project has a deadline in 6-8 months. Therefore, it seems that the PO is committed to invest in an efficiency-enhancing activity and just needs time to build the storage. The PO could thus benefit from the Derogation provided that the efficiencies that will be created by this storage activity are likely to be significant. However, this is unlikely given that the PO intends to provide storage only for 1 % of the total wheat sold by the PO. Regarding the other activities, the PO provides information to its members in form of newsletters. It is possible that such information could be useful and even be efficiency enhancing. Nevertheless, it is not obvious that the information provided in itself creates significant efficiencies. As regards barley, there are no efficiency enhancing activities either in place or planned. Further, as regards the share of wheat and barley bought from non-members and the share on the total national production, they seem not to be fulfilled.



Firstly, the share of the products bought from non-members is for wheat 63% and for barley 53% of the total quantity of contractually negotiated by the PO. Therefore, such activity cannot be considered as ancillary. Secondly, the share of the contractually negotiated product by the PO in both wheat and barley is over 15% of the total national production. Therefore, the Derogation is not applicable to the situation of the PO.